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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. —

T. L. BISHOP, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

CARLEEN F, INCORPORATED, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners [1] hereby pray that a writ of certiorari issue to review the judgments of the Court of Appeals

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[1] The unsuccessful appellees below in Opinion No. 71-3550 were (App. *infra*, p. 1a): T. L. Bishop; Marion Duzich; Oscar Galjour; Joe Magee; C. O. Robert; Kenneth Seals; Jack Yardley; Nathan Boudoin; Joe Buckmaster; John Lytle, t/a Lytle Shrimp Operations; Gulf Trawlers, Inc.; Sidney E. Herndon, d/b/a Herndon Marine Products Co.; and Johnson & Johnson Processors, Inc. Those in

for the Fifth Circuit both of which were entered in these proceedings on February 27, 1973.

OPINIONS BELOW

The separate opinions of the Court of Appeals, reported at 476 F.2d 977 and 476 F.2d 981, appear in the Appendix, *infra*, pp. 1a and 36a. The memorandum opinions of the District Court for the Southern District of Texas[2] were not officially reported, but are reproduced in the Appendix, *infra*, pp. 11a and 36a.

JURISDICTION

Both judgments of the Court of Appeals for the Fifth Circuit involved here were entered on February 27, 1973 (Appendix, *infra*, pp. 9a and 34a). Mr. Justice Powell extended the time for filing the petition to July 27, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The coverage of the Federal Insurance Contributions Act (FICA) extends only to employees—a category which excludes all persons who do not have "the status of an employee . . . under the usual common law rules applicable in determining the employer-employee relationship." (Section 3121(d)(2) Internal Revenue Code). In this case the District Court found that captains and

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Opinion No. 71-3377 (Appendix, infra, p. 36a) were: Carleen F, Inc.; Madeline F, Inc.; Bryan Paul, Inc.; Donna Jean, Inc.; Hazel Foster, Inc.; Isabel G, Inc.; Leslie Lorraine, Inc.; Three G's, Inc.; Black Magic, Inc.; Miss Dene, Inc.; Sandra F. Inc.; P. C. Comeaux and W. M. Gore, t/a m/v "Eva C"; Harold N. Rotereau, t/a Trawler "St. Vincent."

[2] *T. L. Bishop* v. *United States* was tried in the Corpus Christi Division, while *Carleen F. Incorporated* v. *United States* was tried in the Galveston Division.

crewmen using petitioners' shrimp trawlers were demise charterers within the meaning of the FICA. The question presented is whether, in setting aside this determination, the court of appeals overstepped the proper bounds of judicial review and applied erroneous legal principles.

2. Whether a determination of excise tax liability under the FICA (§ 3100 *et seq.* Internal Revenue Code) by application of the principles of maritime law peculiar to the Jones Act (46 U.S.C. § 688) violates the "uniformity" provisions of Article I, Section 8 of the Constitution.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

The pertinent portions of § 3121 of the Internal Revenue Code of 1954 and § 31.3121(d)-1 of the Treasury Regulations on employment taxes, and, the provisions of the Jones Act, 46 U.S.C. § 688, are printed in the Appendix, *infra*, pp. 64a-68a.

Article I, Section 8, cl. 1 of the Constitution provides:

> "The Congress shall have power to lay and collect taxes, duties and imposts and excises . . . but all duties, imposts and excises shall be uniform throughout the United States."

STATEMENT

The twenty-six petitioners sought to have refunded taxes paid by them pursuant to the Federal Insurance Contributions Act, 26 U.S.C. § 3100, *et seq.*

The facts as to each petitioner are for all practical purposes, the same, and show that each petitioner was the owner of a shrimp trawler and that by oral agreement each petitioner (also called "owner") in effect rented his boat to a captain, who in turn, furnished the crew, consisting of one or two fishermen in addition to the captain (Appendix, *infra*, 12a, 26a, 40a-41a, 46a, 51a).

The financial arrangements ranged from 40% to 60% of the catch to the captain and his crew and the balance to the owner. This arrangement in maritime parlance is called the "lay" plan, or fishing on shares, but no partnership was created. (Appendix, *infra*, pp. 12a, 25a, 44a-45a).

The captain of each boat was in complete control of the vessel and its operations from the time it left the dock until it returned. Each trip was considered by the parties a separate and complete transaction, to be renewed at its completion, or not, as the parties may have agreed. (Appendix, *infra*, pp. 12a, 24a-25a, 28a, 29a, 31a, 32a, 41a-42a, 47a, 48a).

The captain carried with him no list of "does and don'ts" and was not required to report to the owner until he turned the boat back to him. (Appendix, *infra*, 12a, 24a, 29a, 41a-42a, 43a, 49a-50a).

The captain purchased the food, fuel and ice which were paid for out of his and the crew's share. The owner insured and paid for repairs and damages to the boat, and in each case had some say (for reasons other than the owner's profit) where the shrimp were delivered if the boat returned to the home port; but where the shrimp were to be delivered and sold in another port was up to the captain. (Appendix, *infra*, pp. 12a-13a, 27a, 28a, 30a, 42a, 43a-44a, 45a, 47a, 48a-49a).

Each captain determined the qualifications of his crew and separately agreed with them, to the exclusion of the owner, how much each crewman was to be paid. (Appendix, *infra*, pp. 24a, 26a, 27a, 41a).

The captain, not the owner, decided when to depart on a trip, when to return, when to fish, where to fish and all other matters concerning the operation, navigation, maintenance and fishing of the boat from the commencement of the trip to its end. (Appendix, *infra*, pp. 24a-25a, 41a-42a).

It was understood that when the catch was put aboard the boat, the captain was then in possession of the catch which was owned by him (including the crew) and the owner in the agreed proportions. (Appendix, *infra*, pp. 26a, 32a, 45a).

There was no guarantee of compensation to the captain by the owner of any kind regardless of the time or effort expended in catching shrimp. All unpaid expenses of the captain's portion of the trip were considered the captain's personal obligation. (Appendix, *infra*, pp. 28a, 47a-48a).

There was no express agreement specifying the extent to which the owner had control over the captain and it was clear from the evidence that no control was exercised over the manner and methods of the undertaking used by the captain and crew, nor did the owner reserve any right of control over the vessel or the fishermen. (Appendix, *infra*, pp. 29a, 31a, 32a, 42a, 43a, 48a). Nor was there any effort by the owner to control the captain and crewmen to such an extent that their status would be one of employee rather than a demise charterer. (Appendix, *infra*, pp. 32a, 42a).

When the captain unloaded a catch at a port other than the home port it was his prerogative to sell the fish at a fishhouse of his choice where the best price could be obtained. The captain could, and did, service the boat with fuel, ice and groceries at such port and pay for them out of the proceeds from the sale of the catch. At his discretion, the captain could make the settlement between himself and the owner at that time by taking a share of the sale proceeds and sending the balance to the owner. Or, if he chose, the settlement could be deferred until the boat reached the home port. (Appendix, *infra*, pp. 13a, 30a, 48a, 49a).

There were no labor unions involved. Each owner negotiated his arrangements to let the vessel to the cap-

tain on an individual basis. (Appendix, *infra*, pp. 31a, 42a).

Neither the captain nor crewmen were required to sign ship's articles defining the owner's and fisherman's duties, nor was the captain required to keep a ship's log. (Appendix, *infra*, pp. 31a, 49a-50a).

The owner's boat did not operate under pre-arranged time schedules of departure and arrival, nor was the captain required or expected to follow a prescribed course or route common in other commercial maritime enterprises. (Appendix, *infra*, pp. 31a, 50a).

In these tax refund suits, the owner contends that the fishermen, comprising the captain and crewmen, were not his employees for purposes of the Federal Insurance Contributions Act, 26 U.S.C. § 3100, *et seq.* From this it was reasoned that the owner was not obligated to deduct, withhold and contribute as taxes, portions of the moneys the owner and fishermen received as settlements after completion of the various fishing expeditions undertaken by the fishermen in the owner's boat. (Appendix, *infra*, pp. 21a, 51a). The owner, on a trip basis, relinquished nearly complete control, command and navigation of the boat to the captain. (Appendix, *infra*, 13a, 19a, 38a-39a, 48a, 50a-51a).

A. Decisions of the District Court

The trial judges heard the evidence and examined carefully the oral arrangement between the owner and the captain for the letting of the vessel under the "lay" or share method of payment. The trial courts concluded the captain was a demise charterer and hence owner *pro haec vice*, which in turn made him the employer of the crew. In reaching that conclusion the trial courts judged the captain's status against the standards of maritime law (Appendix, *infra*, pp. 13a, 15a, 18a-19a, 32a, 37a-38a,

52a), and found convincing authority in this Court for concluding the captain was owner *pro haec vice* under the lay system. *Thorp* v. *Hammond*, 79 U.S. (12 Wall) 408, 416 (1870). Other courts were in accord. See, *The Carrier Dove*, 97 F. 111 (CA-1, 1899); *The Mettacomet*, 230 F. 308 (D. Mass., 1915) *aff'd*, 233 F. 261 (CA-1, 1916); *Cromwell* v. *Slaney*, 65 F. 940, 941 (CA-1, 1933); *Peters* v. *Rohrman*, 272 F. 338, 339 (D. N.J., 1921); *Solet* v. *M/V Capt. H. V. Dufrene*, 303 F. Supp. 980 (ED La., 1969). (Appendix, *infra*, pp. 13a-15a, 53a-56a, 57a).

The trial courts applied the common law rules to the relationship under the principles of general maritime law, giving primacy to the factors of control, concluding the captain was not an employee of the owner under the FICA, but an independent charterer. At the same time the trial courts rejected the application of those maritime rules governing Jones Act injury and wrongful death cases for determining whether the fishermen were the owner's employees. (Appendix, *infra*, pp. 13a, 15a, 19a, 21a, 51a-52a, 53a, 55a, 61a-62a). The trial courts drew a distinction between maritime rules applicable in deciding "employee" status for tax purposes and the rules applicable in injury/death cases. In tax cases the parties are of course the boatowner and the tax collector. (The seamen's rights and remedies are not in issue nor would they be bound by any decision in a proceeding where they were not parties.) In the injury/death cases, the maritime law, treating seamen as the wards of admiralty, enlarged the definition of employee giving effect to the ameliorating purposes of the Jones Act. For humanitarian reasons the Jones Act gives primacy to the recognition of the cost and debilitating effect of industrial injury, and minimizes factors of control when determining "employee" status. Obviously the standards of maritime law extend no protective wardship to tax col-

lectors in their controversies with boatowners nor are humanitarian reasons a factor in determining "employee" or "demise charter" status where tax collectors are concerned.

Based upon this reasoning, the trial courts' conception of maritime standards under the FICA enunciated by this Court in *United States* v. *Webb, Inc.*, 397 U.S. 179 (1970), compelled the conclusion that the captain was a demise charterer and owner *pro haec vice*. (Appendix, *infra*, pp. 13a, 16a, 19a, 32a, 53a, 61a-62a).

B. Court of Appeals Decisions

The reviewing court reversed the decisions of the district courts contending there was no distinction in maritime standards governing tax cases and cases in a non-tax context, and that Jones Act injury/death principles were the sole and proper source of maritime law in all determinations of "employee" status. (Appendix, *infra*, pp. 5a, 6a). The court below considered the economic disparity between an owner, with costs for operating the vessel, and the captain whose capital outlay was small in comparison, as controlling and concluded that the captain's command and control in the demise sense was not realistic (Appendix, *infra*, pp. 6a-7a). The court's thinking runs counter to this Court's holding and rationale in *United States* v. *Shea*, 152 U.S. 178, 190 (1893), upholding a demise stating:

> "We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control."

The court of appeals ignored the realities of the captain's command, control and navigation free from the owner's realistic interference in a tax context, and chose to de-

feat the existence of a demise on economic grounds without citing authority other than Jones Act injury/death principles. (Appendix, *infra*, pp. 5a, 7a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals held in this case that the captain and crewmen were the owner's employees within the scope of the FICA, reversing the conclusion of the trial court that the captain was a demise charterer and, as owner *pro haec vice*, was the employer of the crew. This case is important not only to the twenty-six owner petitioners and the captains and crews involved, but to countless owners of fishing vessels and fishermen on both Oceans, the Gulf of Mexico and on American flag vessels fishing everywhere in the world. Inherent in the Fifth Circuit's opinion is the implication that the vessel owners, rather than the captains, would be more responsible sources upon whom liability of collecting these taxes should fall. Even assuming, *arguendo*, that to be so, this Court should review the decision below so as not to deny the owners and captains the ancient precedent cited for the proposition that these "lay" agreements created demise charters.[3] To hold these seamen to be employees of

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[3] *Thorp* v. *Hammond*, 79 U.S. (12 Wall) 408 (1870). This Court held that the general owners of a vessel were not liable for damages resulting from a collision between their vessel and another where one of the co-owners become the charterer, at 79 U.S. p. 416:

> "He sailed the vessel on shares, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying the general owner the other half. It is clear, therefore, that he must be considered as having been the owner *pro haec vice*."

In *The Carrier Dove*, 97 F. 111 (1 Cir., 1899), the master chartered a fishing vessel on the "quarter clear lay" of the catch. In response to a claim against the owners by the fishermen to establish a lien for wages, the First Circuit clearly indicates that

the owners *on these facts* in order to provide the tax collector supposedly a more responsible collection source will require a change in established maritime doctrine—a change the Fifth Circuit should have left to the Congress.

1. The question resolves itself into whether the evidence sustains the findings of fact by the District Court. This issue does not arise upon the trial court's disregard or misunderstanding of some definite and well-established fact. It extends to almost every detail of the decision.

The reviewing court professed acceptance of the trial judge's findings [4] yet it tried the case *de novo* on the record and substituted contrary findings of its own. For reversal, the court below seized upon the trial court's finding that either party, the owner or the captain, could terminate their relationship at the end of any trip after sale of the catch of shrimp, and therefore, as a matter of economic reality, the captain's control, free from the owner, was not realistic.[5]

The mere severing of relationships at the conclusion of a project in any undertaking does not necessarily con-

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"fishing on the lay" agreement creates a demise between the owner and the captain with the upshot that the crew are employees of and must look to the captain not the owner. See also *The Mettacomet*, 230 F. 308 (D. Mass., 1915) *aff'd*, 233 F. 261 (1 Cir., 1916). In more recent times, on facts similar to these here in all material respects, the captain of a shrimp trawler was held a charterer in a Jones Act case. *Solet* v. *m/v Capt. H.V. Dufrene*, 303 F. Supp. 980 (ED La., 1969).

[4] "Our contrary conclusion does not rest on a rejection of the trial judge's findings of fact. . ." (Appendix, *infra*, p. 3a).

[5] "Considering the relative economic disparity between the owner of an expensive ocean-going vessel with high costs for operating, bunkering, maintenance and insurance, and a prospective master whose only investment in the enterprise is his time and energy, this right to terminate is a powerful force. The notion that a master really has the full command, posssesion and control of the ship to do as he pleases in that fishing trade is simply not realistic." (Appendix, *infra*, pp. 6a-7a).

vert an independent contract relationship into that of master and servant. No good reason appears in the appellate court's opinion why relationships between boatowners and fishermen should be different. (Appendix, *infra*, p. 24a, Fdg. 6). Furthermore, that court's reasoning is contrary to this Court's admonition and rationale in *United States* v. *Webb, Inc.*, 397 U.S. 179, 185-186 (1970), that in 1948 Congress had rejected the test of "economic reality" when determining who were employees under the FICA.

The Court below simply reweighed the evidence and reviewed the trial judge's findings that were almost entirely concerned with imponderables, such as the intents of the parties respecting the degrees of control to be exercised and relinquished in the arrangement, whether the captain made business decisions in his negotiations with the owner, whether the captain's profit or loss was attributable to the way in which he combined efficiency and economy in managing the vessel and to what extent the owner could impose his will upon the captain.

The foregoing were the primary issues of fact resolved by the trial court favorable to the petitioners. The Fifth Circuit reversing, without citation of authority, stated:

> "We simply determine that the facts found by the District Court (footnote omitted) * * * are insufficient to make out the *requisite* surrender of control of the vessel by her owner to the master." (Appendix, *infra*, p. 3a) (Emphasis added)

However, the judgments of the trial courts were supported by opinions prepared with obvious care (Appendix, *infra*, pp. 12a, 36a) analyzing the evidence and showing the reasons for the findings. The memoranda and judgments represented the considered judgment of able trial judges, after patient hearing, that the government's evidence fell short of rebutting that of the peti-

tioners, a not uncommon form of litigation casualty from which the government is no more immune than others. *United States* v. *Yellow Cab Company*, 338 U.S. 338, 340 (1949).

The decision below is in conflict with the pertinent decisions of this Court. The reviewing court did not accord the district court that full measure of judicial deference to its findings of fact under Rule 52(a) F. R. Civ. P. which has been prescribed by this Court in tax cases in general, *CIR* v. *Duberstein*, 363 U.S. 278 (1960) and in particular respecting the employer-independent charterer issue in tax-oriented maritime cases, *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962) and *United States* v. *Webb, Inc.*, 397 U.S. 179 (1970).

The court below simply compared the cases here with others involving vastly different facts,[6] concluding there were no material differences.

Application of the statutory concept of employment under the FICA in the context of the fishing industry involves an exercise of judgment, we stress, that is peculiarly within the province of the finder-of-fact, rather than the reviewing court. The Court below manifestly disregarded the holding and rationale of this Court in a fisherman tax case, *Enochs* v. *Williams Packing Co.*, *supra*, 370 U.S. at 3:

> "'[D]egrees of control, opportunities for profit or loss, investment in the facilities, permanency of the relation and skill required * * * are important for decision [under these statutes.]'"

Again, this Court, in *United States* v. *Webb*, *supra*, 397 U.S. 179 stated there was no mechanical test of "em-

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[6] *Anderson* v. *United States*, 450 F.2d 567 (5th Cir., 1971) and the court's remand in *United States* v. *Webb, Inc.*, 424 F.2d 1070 (5th Cir., 1970) (Appendix, *infra*, pp. 3a, 5a-6a).

ployee" under the rules of maritime law and at 397 U.S., p. 194, said:

> "It is clear that this brief sketch of relevant factors cannot be intended to provide a workable test, complete in itself, displacing the common law rules Congress so carefully tried to preserve. Rather the Regulation provides a summary of the principles of the common law intended as an initial guide for the determination * * *."

The Regulation (Appendix, *infra*, p. 65a) requires that determinations of "employee" status be on a case-by-case basis. At 26 C.F.R. § 31.3121(d)-1(3):

> "Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts in each case."

Upon the facts in this case the captain had no responsibility to the owners apart from those common in charter arrangements in the fishing industry. The owner exercised no control over the captain and crew once the boat was let. For all practical purposes, the owner retained no control over the command, navigation or operation of the vessel until the trip was completed and the rental was paid by dividing the proceeds from the sale of the catch and a settlement of the respective shares and expenses was determined. Clearly the captain was a demise charterer on the facts here.

Clarification of the application of maritime standards to tax cases is needed (where seamen are not parties to the controversy) for determining whether "employee" status of maritime personnel is an issue of fact or one of law. The error here should be corrected in the interest of the sound administration of the Federal Insurance Contributions Act.

2. This case discloses a demonstrable need for the intervention of this Court to clarify the standards of maritime law applicable under the FICA in determining whether a captain is an employee of the owner, or is an owner himself, *pro hac vice*, and thus the employer of the crew.

The trial courts below looked to the general maritime decisional law where fishermen on the lay or share system were held demise charterers and applied the "usual common law rules applicable in determining the employer-employee relationship" contained in the FICA. Giving primacy to the control factors emphasized by this Court,[7] it was concluded by the trial courts that the captain was a demise charterer and not the owner's employee.

On review, the court of appeals reversed tracing the ten-year Odyssey through the Fifth Circuit and this Court in quest of the answer of who is the employer—captain or boatowner—of crew members of fishing vessels working on a lay for the purpose of fixing tax liabilities under the FICA.[8]

The continued uncertainty was derived from the cautious words of this Court as it (1) held that maritime standards should control but (2) did not undertake to assay either what that law was or what the lower courts should do under it.[9]

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[7] In *United States* v. *Webb, Inc.*, 397 U.S. 179 at 192 this Court stated: "Control is probably the most important factor under maritime law (footnote omitted) just as it is under the tests of land-based employment."

[8] The cases covering the ten-year period are listed in the opinion below, Appendix, *infra*, pp. 2a-3a.

[9] Reversing *United States* v. *Webb, Inc.*, 402 F.2d 956 (CA-5, 1968) this Court said, 397 U.S. 179, 194 (1970): "We conclude the Court of Appeals erred in declining to judge the status of the captains and crewmen against the standards of maritime law. Accordingly, the judgment is reversed, and the case is remanded to that court for proceedings consistent with this opinion."

The trial judges below were mindful of the Fifth Circuit's leaning toward the application of Jones Act-injury/death case principles as the maritime standard for determining "employee" status in a tax context under the FICA.[10] It is well settled that Congress intended that the Jones Act not be constricted by common law concepts of control so as to bar from its benefits, as demise charterers, those, who as a matter of economic reality, were dependent upon a business where services were renderd. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783, 790 (1949).

Rejecting Jones Act principles as the applicable maritime standards in tax cases the trial courts said (Appendix, *infra*, pp. 15a, 55a).

> "The courts have deviated from the general maritime law in personal injury and death cases by requiring, for humanitarian reasons, that fishermen, being the wards of the sea, not be precluded *ipso facto* from recovery simply by the construction of an implied demise. The court does not believe that cases which create an enlarged standard for humanitarian purposes should be considered as changing the general maritime law or the maritime common law."

The court of appeals swept aside this reasoning, without citation of authority, stating—"there is no basis for thinking * * * that courts have 'deviated from the general maritime law in personal injury cases' in determining the existence of a demise charter." The court then focused on the precise issue and concluded in sweeping terms: "There is but a single, (Jones Act) not as urged, a double, standard." (Appendix, *infra*, p. 6a)[11]

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[10] See *Anderson* v. *United States*, 450 F.2d 570 (CA-5, 1971), and Appendix, *infra*, pp. 5a, 6a.

[11] The Fifth Circuit's rigid cataloguing of Jones Act injury/death principles as controlling a demise in tax-oriented maritime cases

The Fifth Circuit's conclusion runs contrary to the rationale of this Court in *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) holding that the same person may be an "employee" and an "independent contractor" under separate statutes having different legislative purposes.[12]

Despite the reviewing court's scorn, the seed of uncertainty persists in that court's strong suggestion that this Court should look at the whole question again.[13]

This petition literally cries out, from both sides, for clarification by this Court for the measure of maritime standards to be applied in cases governed by the Internal Revenue Code. Tax provisions generally are not native to the niceties of maritime's ancient lore. Modern preferences dictate that a tax statute be given a con-

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runs counter to this Court's holding and rationale in *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375 (1924) asserting the flexibility of maritime's principles to reflect the economy's constant changing relations, saying at 264 U.S. p. 388: "But as Congress is empowered under the Constitutional provision to alter, qualify, or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common law rules, or some modification of the latter, if the change is country-wide and uniform in operation." See also footnote 14, *infra*, p. 17.

[12] "* * * and within a single jurisdiction a person, who, for instance, is held to be an independent contractor for the purpose of imposing vicarious liability in tort may be an 'employee' for purposes of particular legislation, such as unemployment compensation. * * * In short, the assumed simplicity and uniformity, resulting from the application of 'common law standards' does not exist." *NLRB* v. *Hearst Publication, Inc., supra*, 322 U.S. at 122.

[13] The question was raised obliquely in pursuing this Court's remand in *United States* v. *Webb, Inc.*, 397 U.S. 179 (1970) where certiorari was denied, 1970, 400 U.S. 902, "but (this) Court is free and just might re-review it in the current cases. See Hughes Tool Co. v. TWA, 1973—U.S. n.1 * * *." (Appendix, *infra*, p. 5a, ftn. 5).

temporary construction.[14] This Court should refuse to harken back to the terms and terminologies recited by the Fifth Circuit's Jones Act cases whose origins are far removed from the modern phenomena of employment taxation. To secure the uniform application of the tax laws, this Court should rectify the continued and persistent error of the Fifth Circuit in this area of taxation.

3. The respondent's enlarged standard for determining "employee" status under the Jones Act (46 U.S.C. § 688) as the basis for fixing the petitioner-owner's FICA employment tax liabilities violates the "uniformity" requirements of Article I, Sec. 8, cl. 1 of the United States Constitution. Under maritime standards the owner is liable, as an employer, for excise taxes[15] under the FICA if he retains a sufficient degree of control over the vessel's operation, command and navigation. The owner is not liable as an employer of the captain and crew "where there is nearly total relinquishment of control * * *." *United States* v. *Webb, Inc.*, 397 U.S. 179, 192. The test of "control" is the realistic application of the common law rules spelled out in the FICA and Treasury Regulation. *United States* v. *Webb, Inc., supra*, at p. 194.

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[14] The flexibility of the general maritime law (called the "law of the sea") allowed it to take on the coloration of the "usual common law rules" outlined in the FICA and Treasury Regulations when Congress amended the Social Security Act in 1939 [53 Stat. 1360, 1373-1374, c. 666, amending § 209 of the Social Security Act, 26 U.S.C. § 3121(b)], to include maritime personnel for the first time. *United States* v. *Webb, Inc.*, 397 U.S. 179, 190 (1970). "This is a recognized mode of incorporating one statute, or system of statutes, into another, and serves to bring into the latter all that is fairly covered by the reference." See, *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375, 392 (1924), which brought the principles of the Federal Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65, as amended, 45 U.S.C. § 51, *et seq.*, under admiralty jurisdiction. *Id.*, at p. 391. "[I]t brings into that law (maritime) new rules drawn from another system." *Id.*, at p. 388.

[15] The employment taxes involved here are excise taxes. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583 (1937) and *Helvering* v. *Davis*, 301 U.S. 619, 645 (1937).

The court of appeals persistent effort to superimpose the relaxed standards of the Jones Act (46 U.S.C. § 688) upon the provisions of the FICA, is to assess and collect excise taxes by the device of a negligence/wrongful death statute, rather than the more restrictive provisions of the Internal Revenue Code Congress provided for that purpose when it amended the Social Security Act in 1939 [16] and put the FICA to sea.

The imposition of excise tax liabilities should not be relegated to statutory schemes outside the Internal Revenue Code. The intervention of this Court is required therefore to restore the efficient and uniform administration of the Federal Insurance Contributions Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[16] 53 Stat. 1360, 1373-4, c.666, amending § 209 of the Social Security Act, 26 U.S.C. § 3121(b). See also footnote 14, *supra*.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3550

T. L. BISHOP, MARION DUZICH, OSCAR GALJOUR,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

JOE MAGEE, C. O. ROBERT, KENNETH SEALS,
JACK YARDLEY,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

NATHAN BOUDOIN, JOE BUCKMASTER, JOHN LYTLE,
t/a LYTLE SHRIMP OPERATIONS,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

GULF TRAWLERS, INC., SIDNEY E. HERNDON, d/b/a HERNDON MARINE PRODUCTS, CO.,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

JOHNSON & JOHNSON PROCESSORS, INC.,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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(February 27, 1973)

Before BROWN, Chief Judge, GODBOLD and SIMPSON, Circuit Judges.

BROWN, Chief Judge: The ten year Odyssey of who is the employer—shipmaster or shipowner—of crew members of fishing vessels working on a lay for the payment of FICA and FUTA taxes commenced in an abortive effort to enjoin the Government, *Enochs* v. *Williams Packing Co.*, 1962, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292; but followed shortly by the unfavorable decision to the Government in *Crawford Packing Co.* v. *United States*, S.D. Texas, 1962, 228 F.Supp. 549, *aff'd.*, 5 Cir., 1964,

330 F.2d 194, sustained momentarily in *Webb I, United States* v. *Webb, Inc.*, 5 Cir., 1968, 402 F.2d 956, but stranded by Supreme Court reversal, 1970, 397 U.S. 179, 90 S.Ct. 850, 25 L.Ed.2d 207, with a holding for the Government in *Webb II* on remand to us, *United States* v. *Webb, Inc.*, 5 Cir., 1970, 424 F.2d 1070, and extended articulation of controlling principles in *Anderson* v. *United States*, 5 Cir., October 1971, 450 F.2d 567; may hopefully, *cf.*, *Parr* v. *United States*, 5 Cir., 1972, —— F.2d —— [No. 72-2231, November 30, 1972], be closer to an end as we dispose of a series of cases[1] decided subsequent to our per curiam reversal in *Webb II*, but prior to our October 1971 decision in *Anderson*.

We hold that the seamen are employees of the shipowner, not the shipmaster, and once again reverse.

To bring this nearer to a close what we write is not for those to read who run. Without repetition we start against the background of what has been written and done before. But in the quest for standards to guide both litigants and District Courts we think some things merit brief discussion.

As before, our contrary conclusion does not rest on a rejection of the trial Judge's findings of fact, so we need not resolve the oft-times troublesome problem of deciding whether our review is of facts as to which the Plimsoll line of F.R.Civ.P. 52(a) cases is the determinant or whether it is a case for unrestricted review as a question of law. We simply determine that the facts found by the District Court[2] are not significantly different from those in *Anderson* and—as there and in

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[1] Elizabeth Ann, Inc. v. United States (71-3376), 5 Cir., 1973, —— F.2d ——; Carleen F, Inc. v. United States (71-3377), 5 Cir., 1973, —— F.2d ——; Mayport Fisheries Company v. United States (71-3046), 5 Cir., 1973, —— F.2d ——.

[2] See Bishop v. United States, S.D. Texas, May 1971, 334 F.Supp. 415, 421-25, for the Court's finding of fact.

Webb II—we hold that they are insufficient to make out the requisite surrender of control of the vessel by her owner to the master. With that we could perhaps rest without saying more. But in view of the tenacity of counsel for all of the litigating shipowners who has persevered undaunted with that "ant-like persistence of solicitors," *Lyon* v. *Boh*, S.D.N.Y., 1924, 1 F.2d 48, 50, we think some further discussion is appropriate.

Having failed in *Anderson* for "application of a sort of brackish form of land-based common law principles," 450 F.2d at 570 and n.5, the taxpayers no longer urge us to dilute its salinity. What they seek now is not a maritime law for the Medes and Persians which altereth not. Rather they seek a maritime law of demise charter for injury-death-Jones Act-*Sieracki-Ryan-Yaka* purposes on a stricter "humanitarian" basis and another parallel, but much looser, standard for "commercial" purposes which would obviously include tax cases.

This argument is essentially built on the cautious words of the Supreme Court as it (i) held that maritime standards should control but (ii) did not undertake to assay either what that law was or what the Fifth Circuit would or should do under it.

In *Webb I* we stated that if " * * we were free to apply maritime law * * * we would reverse * * * because it is clear that under maritime law the captain is the agent of the owner * * and the crew hands are employees."[3] Because in this *Webb I* discussion we had referred to injury/death/Jones Act situations, shipowners then focused on the Supreme Court's reservation: "We are not called upon to, and do not, intimate any view on the correctness of the Court of Appeal's state-

[3] See *Anderson*, 450 F.2d 570, n.8, which quotes in full from *Webb. I.*

ment on this score." 397 U.S. at 182, n.4, 90 S.Ct. at ——, n.4, 25 L.Ed.2d at 210, n.4.[4]

But this argument is not sound and, worse, it is two cases too late so far as this panel's ability or willingness to take action short of an en banc—which we do not suggest. Of importance to the Supreme Court was the question—and its decision—of maritime principles. Having decided that, it properly left the elucidation of those principles to the lower courts. And when it came back to us in *Webb II* we effectively answered the question that such injury/death cases were a proper source of maritime law.[5] And this was reiterated in *Anderson.*

But, more fundamentally, there is no basis for thinking, as the District Judge characterized it, that courts have "deviated from the general maritime law in personal injury cases" [6] in determining the existence of a

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[4] This was preceded by the recital from our *Webb I* (see note 3, *supra*) and the Court's statement:

> "It [Court of Appeals] reviewed the facts and observed that "it is clear that under maritime law the captain is the agent of the owner * * * and the crew hands are employees' and that 'if we were free to apply maritime law as a test of the employer-employee relationship we would reverse the decision of the District Court.'"

397 U.S. at 182, 90 S.Ct. at ——, 25 L.Ed.2d at 210.

[5] Certiorari was denied, 1970, 400 U.S. 902, 91 S.Ct. 138, 27 L.Ed.2d 138 but the Court is free and just might, re-review it in the current cases. See Hughes Tool Co. v. TWA, 1973, —— U.S. n.1, —— S.Ct. ——, —— L.Ed.2d —— [Nos. 71-827, 71-830, January 10, 1973].

[6] "The courts have deviated from the general maritime law in personal injury and wrongful death cases by requiring for humanitarian reasons, that fishermen, being wards of the sea, not be precluded *ipso facto* from recovery simply by the construction of an implied demise. The Court does not believe that cases which create an enlarged standard for humanitarian purposes should be considered as changing the general maritime law or the maritime common law."

334 F.Supp. at 418.

demise charter. There is but a single, not as urged a double, standard: Has the shipowner surrendered virtually complete possession, control and navigation to the non-owner (charterer)? If so, it is, if not, it's not, a demise.[7]

More than that, the law respecting injury/death is not some recent intrusion on maritime law. It is a part of the whole. What the maritime jurisprudence would compel is to be influenced by its presence as a part of the whole, not as some supposed outside, foreign principle. And as with any growing decisional-oriented body of law, current developments in response to contemporary problems may well bring about a modification of formerly settled principles in related or adjacent areas.

In *Webb II* and *Anderson* we have not depended solely on injury/death holdings. But they have been, now are, and will be—along with the full body of charter party law—a significant permissible source for the conclusion that these arrangements lack that "nearly total relinquishment of control" to constitute "a bare boat, or demise, charter", 397 U.S. at 192, 90 S.Ct. at ——, 25 L.Ed.2d at 216.

We need not catalogue beyond that done in *Anderson* the factors, plus or minus, bearing on demise. One is critical, another significant. Although in practice the masters chosen to take over a vessel tended to serve for a considerable time, the Court expressly found that either could terminate at any time—certainly on sale of the catch at the port of arrival. Considering the relative economic disparity between the owner of an expensive ocean-going vessel with high costs for operation, bunkering, maintenance and insurance, and a prospective master whose only investment in the enterprise

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[7] We cannot improve on *Anderson*, 450 F.2d at 572, n.13, in the articulation of criteria.

is his time and energy, this right to terminate is a powerful force. The notion that such a master really has the full command, possession and control of the ship to do as he pleases in that fishing trade is simply not realistic. See *Stevens* v. *Seacoast Co.*, 5 Cir., 1969, 414 F.2d 1032.

That leads to the other factor we described as significant. Except for extraordinary situations the master was to deliver the catch for sale or receipt at a specified place. Lacking any real economic independence in the employment of the vessel *vis-a-vis* the shipowner, the master and his crew are really a part of the owner's enterprise and all of the various parts of the arrangements are simply a means of calculating compensation.

The so-called independence of these masters from detailed orders on how to perform their work is beguiling. But this is not unique to the arrangement. This inheres in the calling of those who go down to the sea in ships. On the most obscure of vessels the master is the Lord of the Quarter Deck. See *United Geophysical Co.* v. *Vela*, 5 Cir., 1956, 231 F.2d 816, 819.[8] He may receive

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[8] In *Vela* we made the following observation about the authority of the ship master:

> "But navigation in these circumstances is left neither to Judges nor the Elder Brethren of Trinity House nor those who, in the garb of experts, from the security of a swivel chair now lay out the course with great conviction. "The master is the commander of the ship—lord of his little world. He is master in every sense of the word * * *" The Balsa, 3 Cir., 10 F.2d 408, 409. Whether he has bridge or quarterdeck to stalk, as long as he commands, he is master. It is the Master, then, who must make these decisions and who, clothed with great responsibility, enjoys the greatest and widest of good faith latitude in professional judgment."

231 F.2d at 819. But see Avera v. Florida Towing Corp., 5 Cir., 1963, 322 F.2d 155, 164; Boudoin v. McDermott & Co., 5 Cir., 1960, 281 F.2d 81, 87.

a barrage of radio messages but he is in command. Indeed, reserving the right to direct navigational details would violate not only the traditions of the sea which form a significant part of maritime law, but would also expose such an unwitting owner to a certain loss of his right to limitation of liability, 46 U.S.C.A. § 183, et seq.[9]

On the saline standards of maritime law—the common law of the sea—the shipowners retained significant control and the master and crew members are his employees for life, death and taxes.

REVERSED.

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[9] Shipowners stress some early cases which have held in their situations that to be a demise the charterer did not have to provide fuel, stores, victuals, etc. Significantly, Congress requires this to qualify as a vessel owner for limitation of liability, 46 U.S.C.A. § 186.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3550

D. C. Docket Nos. 68-C-82, 70-C-95,
70-C-96, 69-C-180, 70-C-49

T. L. BISHOP, ET AL.,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

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Before BROWN, Chief Judge, GODBOLD and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby reversed;

It is further ordered that plaintiffs-appellees pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

February 27, 1973

Issued as Mandate: Mar 21 1973

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Maryette Farley
Deputy

July 2, 1973

New Orleans, Louisiana [SEAL]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

[Clerk, U.S. District Court, Southern District of Texas
Filed, June 2, 1971, V. Bailey Thomas, Clerk
By Deputy /s/ C Wright]

Civil Action No. 68-C-82

T. L. BISHOP, MARION DUZICH, OSCAR GALJOUR

v.

UNITED STATES OF AMERICA

Civil Action No. 70-C-95

JOE MAGEE, C. O. ROBERT, KENNETH SEALS,
JACK YARDLEY

v.

UNITED STATES OF AMERICA

Civil Action No. 70-C-96

NATHAN BOUDIN, JOE BUCKMASTER, JOHN LYTLE,
t/a LYTLE SHRIMP OPERATIONS

v.

UNITED STATES OF AMERICA

Civil Action No. 69-C-180

GULF TRAWLERS, INC., SIDNEY E. HERNDON,
d/b/a HERNDON MARINE PRODUCTS CO.

v.

UNITED STATES OF AMERICA

Civil Action No. 70-C-49

JOHNSON & JOHNSON PROCESSORS, INC.

v.

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

The Plaintiffs in the several actions above designated and which, although not consolidated, were tried before the Court at the same time, seek to have refunded taxes paid by them pursuant to the Federal Insurance Contributions Act, 28 U.S.C.A., § 3301, et seq., for the period January 1, 1965, through December 31, 1966. Each plaintiff, whether an individual, partnership or corporation, is doing business in Texas within the jurisdiction of this Court. This Court has jurisdiction of the parties and this action pursuant to the provisions of 28 U.S.C., § 1340. Venue is proper under 28 U.S.C., § 1402.

The facts as to each Plaintiff are, for all practical purpose, the same, and briefly stated show that each Plaintiff is the owner of a boat used primarily for shrimp fishing; that by oral agreement each Plaintiff (also called "Owner") in effect rents his boat to a captain, who, in turn, furnishes the crew, which consists of one or two fishermen in addition to the captain. The financial arrangements range from 35% to 50% of the catch to the captain and his crew, and the balance to the owner. This arrangement is sometimes referred to as fishing on shares or the lay plan, but no partnership is created. The captain of each boat is in complete control from the time it leaves the dock until it returns. He carries with him no list of "does and don'ts" and he is not required to report to the owner until he turns the boat back to him. The captain purchases the food, fuel and ice which is paid for out of the crew's share. The

owner insures and repairs damage to his boat and, in each case, has some say (for reasons other than owner's profit) where the shrimp are delivered if the boat returns to its home port, but where the shrimp is to be delivered in another port is up to the captain. Detailed findings are attached as an appendix hereto.

In determining whether the captains and crewmen who worked on the boats of the plaintiffs, under circumstances above described, were employees of the plaintiffs within the meaning of 26 U.S.C., §§ 3121(d) and 3306(i), it is necessary to judge their status against the standards of the maritime law. *United States* v. *Webb*, 397 U.S. 179, 191 and 194 (1969).

Under general maritime law, the existence of a demise negates an employer-employee relationship between the vessel owner and the crew and says rather that the owner *pro haec vice* is the employer of the crew. Whether or not a demise exists depends on the actual basis of the relationship, and there is convincing authority that fishing on the lay as above outlined creates a demise charter, thereby making the captain of the vessel the owner *pro haec vice* and the employer of the fishermen.

In *Thorp* v. *Hammond*, 79 U.S. (12 Wall) 408 (1870), the general owners of a vessel were held not to be liable for damages resulting from a collision between that vessel and another where one of the co-owners had become the charterer of the vessel, exclusively commanding, sailing and managing it, under arrangements made with the other owners. The Supreme Court pointed out, on page 416, that:

> "He sailed the vessel on shares, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying to the general owners the other half. It is clear, therefore,

that he must be considered as having been the owner *pro haec vice.*"

In *The Carrier Dove*, 97 F. 111 (1 Cir., 1899), the master chartered a fishing vessel on the "quarter clear lay" of the catch. In answer to a suit by the fisherman to establish a lien against the owners for wages, the First Circuit clearly indicates that a "fishing on the lay" agreement creates a demise between the owner and the captain with the upshot that the crew are employees of and must look to the captain and not the owner. See also *The Mettacomet*, 230 F. 308 (D. Mass., 1915), *aff'd* 233 F. 261 (1 Cir., 1916).

The First Circuit continued to adhere to the reasoning of *The Carrier Dove* in *Cromwell* v. *Slaney*, 65 F.2d 940 (1 Cir., 1933), wherein the plaintiff, wife of a deceased seaman, sought recovery from the owner, as employer of a fishing vessel, on grounds of negligence and unseaworthiness. In denying the existence of an employee-employer relationship between the deceased seaman and the owner, the First Circuit stated, at page 941:

> "The operation of fishing vessels under agreements, or lays, so-called, for sharing the proceeds of the catch, has been familiar to those engaged in the business and to the courts for more than a century; and it has been held by the courts that, under a 'fishing lay,' where the captain employs the members of the crew and controls all the operations of the vessel, both in purchasing supplies for the voyage, in determining where he will fish, how long, and in disposing of the catch and settling all the bills, he becomes the owner *pro haec vice*, and that the crew is in the employ of the master and not of the owner."

The Ninth Circuit has recognized the reasoning of the First as valid, but did not follow it in *The Norland*, 101 F.2d 967 (9 Cir., 1939), involving a Jones Act claim, because the facts did not support it. The Court held

that one of the owners went on the voyage to supervise the captain, and, ". . . that the crew was controlled as to where the fishing was to be done, the labor to be performed, and even as to the manner of the performance of their labor . . . ." In light of these facts, the Court then spoke of the facts involved in *The Carrier Dove*, *Cromwell* and *Thorp*, supra, as showing "clearly that the general owners had surrendered entire control, direction and management of the vessel to the master, ..." *The Norland* points out that the issue of the existence of a demise is one of fact, and, by implication, that the trier of fact can, under the authority of *The Carrier Dove*, *Cromwell* and *Thorp*, supra, find upon facts as in the instant case a demise, with the result that seamen are employees of the captain.

The courts have deviated from the general maritime law in personal injury and wrongful death cases by requiring, for humanitarian reasons, that fishermen, being wards of the sea, not to precluded *ipso facto* from recovery simply by the construction of an implied demise. The Court does not believe that cases which create an enlarged standard for humanitarian purposes should be considered as changing the general maritime law or the maritime common law. The common law is generally described as those principles, usage and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. The deviation as to personal injury and wrongful death cases has come about by virtue of the courts' attempt to construe the congressional intent in Jones Act cases. Now, the Court will consider the cases cited by Defendant, and explain why such cases are no authority for denying the existence of a demise on the facts of this case.

In *Hudgins* v. *Gregory*, 219 F.2d 255 (4 Cir., 1955), fishing on shares was held merely not *ipso facto* to create a demise between the master of the vessel and the owner for the purpose of determining an employer-employee relationship upon which to predicate an action under the Jones Act for personal injuries by a seaman. The payment of Social Security and unemployment compensation taxes was used as a part of the basis for determining the plaintiff to be an employee of the owners, not the other way around. Such method of reasoning cannot justify a claim of authority.

The Defendant also cited *Peters* v. *Rohrman*, 272 F. 338 (D. N.J., 1921), which case stated, at page 339:

> "A master operating a vessel on shares is not *ipso facto* an owner *pro haec vice*, but, as is conceded by the counsel for the libelant, an express agreement must be shown, or circumstances from which such agreement can be inferred, by which the possession and control of the vessel was surrendered to the master."

There the Court found a demise based upon circumstances similar to the instant case and that as a result of that demise, the owners could not be held liable for the charterers' breach of a contract of affreightment.

In *Justillian* v. *Versaggi*, 169 F. Supp. 71 (S.D. Tex., 1954) (Allred, J.), the Court held that the captain of a shrimp boat was not the owner *pro haec vice* and therefore not the employer of a seaman who sought recovery from the owner of the vessel under the Jones Act. While we are aware that there is some similarity of the facts here to those in the instant case, the Judge who heard the testimony and observed the witnesses, concluded, on page 72, "Respondent prescribed rigid safety rules and required the Captain to report when any equipment was out of order. His own testimony, quoted in respondent's

brief, shows a rather firm and rigid control of the vessel by respondent."

Here also, the Court used the deducting of withholding and Social Security taxes as one of the bases for determining the employer-employee relationship. In the instant case, the Court must reach the conclusion that the owner is the employer first, before considering whether or not such taxes are owed.

Other seamen's personal injury cases cited by the Defendant are even less in point than *Justillian*, supra, and merit no analysis. Moreover, even though this Court would probably be bound to follow *Justillian* should a similar Jones Act case arise here in the Southern District of Texas, it should be noted that on similar facts even involving seamen's personal injury, at least one other court has gone the other way and found a demise between the owner and the captain of a vessel fishing on shares. *Solet* v. *M/V Capt. H. V. Dufrene*, 303 F.Supp. 980 (E.D. La., 1969).

The Defendant attempts to buttress its position by citing *Guzman* v. *Pichirilo*, 369 U.S. 698, 700 (1962), for the authority that courts should be reluctant to find a demise charter when the dealings between the parties are consistent with any lesser relationship. This is a reading of dictum in *Guzman* totally out of context from the instant case. There the issue was whether an injured longshoreman could recover from the owner of the vessel for unseaworthiness, which had arisen during that time the owner contended the vessel was demised to the longshoreman's employer. Clearly, the humanitarian policies concerning whether to favor a demise were far afield in *Guzman* from those in the instant case. Furthermore, close scrutiny of the cases upon which this dictum of *Guzman* was founded tends to strengthen the proposition that within a commercial context, as opposed to a personal injury context, a court may readily imply the

existence of a demise under appropriate circumstances. For example, in *Reed* v. *United States*, 78 U.S. (11 Wall) 591 (1870), the general owner retained possession, command, and navigation of the ship, *hired the crew*, and contracted to carry cargo for a *specified voyage*. In the instant case, there was no specified voyage and the owner clearly did not hire the crew. See also *Leary* v. *United States*, 81 U.S. (14 Wall) 607 (1871), in which the owner supplied the crew and retained possession of the vessel. Also cited by *Guzman* was *United States* v. *Shea*, 152 U.S. 178 (1893), wherein a demise was found to exist because the vessel was under the exclusive management and control of the government charterer. Whatever presumption against finding a demise, as argued by Defendant, did not appear to be in operation in *Shea*, even though, ". . . the question (of a demise) . . . (was) not free from doubt . . . ." 152 U.S. 191

By dictum, the Fifth Circuit, in *Osland* v. *Star Fish & Oyster Co.*, 107 F.2d 113 (5 Cir., 1939), addressed itself to the issue of whether fishing on shares may be considered a demise from the owner to the captain. There, a seaman was allowed to seek recovery under the Jones Act against the owner of a vessel fishing on the lay plan. The Court stated, on page 114:

> "(The owner) was operating the Mary Carmen in connection with its business of selling fish at wholesale; it furnished the boat and supplied the crew and vessel with oil, gasoline, groceries, bait, and other necessaries for the voyage; it ordered her to sail for a designated place on the Gulf for the purpose of catching a load of fish; it ordered the master to bring said fish to the port of Mobile and to unload the same at its plant."

From a reading of this quote, it is apparent the owner exercised a great deal more control than any of the Plaintiffs now before this Court.

The Defendant has failed to indicate any authority that would preclude this Court from finding a demise here, although the government places considerable reliance on the *Webb* case, with its several opinions. The Fifth Circuit, by way of confirming dicta previously written, did, after the Supreme Court said the standards of maritime law must be observed, hold, without citation of authority, that, under the peculiar facts of the case, the seamen were employees of the boatowner. Even so, *Webb* does not bar the finding of a demise here, since that case did not expressly consider the authority this Court has cited for the proposition that a demise may exist on the facts this Court must consider. We recognize there may be some justification for the Fifth Circuit in *Webb* holding as it did, but, the facts there are dissimilar from these. For example, in *Webb* (271 F. Supp. at 251, 253 and 254), the established facts showed that the boatowners designated the general area for fishing operations, the number of crewmen to be hired, the minimum scale of wages to be paid the crewmen by the captain, the size of bonuses paid the crewmen at the end of a season, where the fish were to be sold, and also provided airplane spotters to aid the captains in locating schools of fish. On the other hand, the facts this Court must deal with show that the captains determined wages, bonuses, crew size, fishing locations, where to sell their catch, and fished without the aid of boatowner-financed airplane spotters. Finally, a close reading of the various *Webb* opinions leaves considerable doubt with this Court that *Webb* was truly a lay or share arrangement under ancient maritime authority because of the extremely significant fact that the boatowners guaranteed for the entire season a fixed price per thousand pounds. Thus, in *Webb* the captains did not share the risks involved in fluctuating market prices as is done under the traditional share or lay agreement.

The Fifth Circuit, in 402 F.2d at 960, moreover, impliedly approved in *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961, 962, 963, 964, 967 (Ct. Cl., 1964), which was the only tax case, as opposed to a personal injury case, that has directly considered the possibility of a demise under anything near the instant case. Although *Cape Shore Fish Co.*, reached a contrary result than here, it also is readily distinguishable on the facts.

For example, in *Cape Shore Fish Co.*, the fishing venture was governed by a union contract. 330 F.2d at 962. Here, there was no union or other contractual agreement between the vessel owners and the crews. In *Cape Shore Fish Co.*, the captain was hired with the understanding of continuity of employment from trip to trip. Here, there was no term contemplated beyond each trip. In *Cape Shore Fish Co.*, the owner was understood to have authority to instruct the crew and did so. Here, beyond standing customs, there were no instructions given the crews by the vessel owners.

In *Cape Shore Fish Co.*, the owner told the captain when to sail, when to return to port, when to paint the boat, when to report the size of the catch by telephone, when to dock the boat, how long to stay at sea, how long to work the crew at sea, how many days to rest the crew ashore, and how to distribute the catch among the crew. Here, these matters were solely within the prerogative of each captain. Also, in *Cape Shore Fish Co.*, the crew was guaranteed a minimum wage for each day at sea, by virtue of a union contract, should the trip be a failure or "broker." Here, there was no guarantee, either to the captains or their crews.

Finally, *Cape Shore Fish Co.* itself recognized that fishing on the lay could, under appropriate circumstances, create a demise (330 F.2d 967) and that whether, for tax purposes, fishermen are employees of the owner or are

employees of the captain of the vessel depends, in turn, on the facts before the Court.

In conclusion, save for *Cape Shore Fish Co.*, supra, the cases cited by the Defendant for the proposition that a demise should not be implied on the facts of this case are not persuasive because they belong to that group of cases in which the Courts, in order to follow an humanitarian policy set by Congress to provide injured seamen with the possibility of recovery from the vessel owner, rather than the sometimes less solvent charterer, deviated from the general maritime law. But other authority and the factual distinctions between this case and the *Cape Shore Fish Co.* persuade the Court to find that *on these facts* there exists between the various vessel owners and the captains a demise agreement by which the crew are employees of the respective captains-owners *pro hacc vice*, rather than of the vessel owners.

Inherent in *Webb*, supra, and in the Defendant's brief here is the implication that the vessel owners, rather than the captains, would be more responsible sources upon whom the liability of collecting these taxes for the benefit of these seamen should fall. Even assuming, arguendo, that to be so, this Court cannot deny the Plaintiffs here the ancient maritime precedent cited for the proposition that these lay agreements created demise charters. To hold these seamen to be employees of the owners *on these facts* in order to provide them supposedly a more responsible collection source will require a change in established maritime doctrine—a change this Court leaves to the Congress.

This Court is of the opinion Plaintiffs severally are entitled to a refund of the Federal Insurance Contributions Act taxes and the Federal Unemployment Act taxes claimed by reason of the erroneous payment and collection thereof, in amounts to be computed by the parties, together with interests and costs as may be allowed by

law. If the amount is not agreed upon within twenty (20) days from the date of this order, the determination of amounts shall be referred to this Court. This memorandum and order shall constitute the Court's findings of fact and conclusions of law.

Plaintiff will, in each case, prepare a proper order in their respective favors, which shall contain the specific amounts recoverable, and each such order shall constitute a final judgment in that case.

Signed this 31st day of May, 1971.

/s/ Owen D. Cox
United States District Judge

APPENDIX

(The following detailed findings of fact were submitted to the Court by the Plaintiffs. The Court considers these findings to be accurate and adopts same. This Appendix is referred to on page 2 of the Court's opinion.)

1. This is an action under the Internal Revenue laws of the United States for recovery of taxes paid pursuant to the Federal Insurance Contributions Act, 26 U.S.C.A., §§ 3100 et seq., and the Federal Unemployment Tax Act, 26 U.S.C.A., §§ 3300 et seq. The plaintiffs seek to have refunded that portion of the Federal Insurance Contributions Act taxes and the Federal Unemployment Act taxes paid by the plaintiffs.

2. Each of the plaintiffs are individuals doing business in the State of Texas, within the jurisdiction of this Court and claim refunds of the taxes in suit for the period January 1, 1967 through December 31, 1968.

3. During the said period, each of the plaintiffs was engaged in the business of commercially fishing for shrimp. The activities of the plaintiffs' business embraced (a) the ownership of one or more shrimp trawlers, (b) the fishing for shrimp under arrangements with captains on the conditions and pursuant to policies outlined in these Findings of Fact, and (c) the sale of the shrimp in the open market.

4. The shrimp boats weighed in excess of ten net tons. These boats were specially equipped, owned and operated solely for shrimp fishing, although fish other than shrimp (such as snapper or flounder) were occasionally caught incidental to fishing for shrimp.

5. After each plaintiff had equipped his boats for fishing shrimp, each would select an experienced fisherman to whom the boats would be turned over for the purpose of fishing shrimp in the Gulf of Mexico. Any

individual so selected was one in whose honesty and integrity plaintiff had confidence and in whom the plaintiff had confidence as to his ability (a) to select a crew (that is, deckhands), (b) to operate the boat, (c) to conduct fishing operations, and (d) to supervise and get along with the deckhands.

6. The arrangement between each plaintiff and captain was entirely oral. The term of the arrangement was not specified or limited. It could be terminated by either party, voluntarily or involuntarily, at the conclusion of any trip, although in practice this occurred only at times when a boat was in port. While the arrangement could be so terminated, custom and practice was for it to be continued over a series of trips for each boat. While not formalized by the parties and designated as such, the arrangement constituted an oral contract pursuant to which the captains used the boats belonging to plaintiffs pursuant to the customs, terms, usages and policies outlined in these Findings of Fact.

7. After an individual was selected as captain, the arrangement between plaintiffs and the captains concluded and the boat was turned over to them by plaintiffs, the captains would take the boat identification papers to the Bureau of Customs and would register with said Bureau as captain of the boat as required by Federal Law.

8. Each captain determined the qualifications of and selected his deckhands (that is, his crew, consisting usually of one or two besides himself), determined the hours and working conditions of the crew and separately agreed with each crewman how much he was to be paid. Each captain had full charge of his crew to the exclusion of the plaintiffs and determined (a) when to depart on a fishing trip, (b) when to return, (c) where to fish, (that is, which fishing ground to work), (d) when to fish, (e) how to fish, (that is, the actual, mechanical process of

operating the fishing nets and gear), and (f) all other matters concerning the operation, maintenance and fishing of the boat from the time of departure from plaintiffs' dock until return of the boat from a particular trip. The foregoing were the exclusive prerogatives of the captains. The deckhands looked to the captains exclusively for directions respecting the fishing venture.

9. It was part of the arrangement and understanding that when the boats operated near Aransas Pass, Texas, the shrimp catch would be returned to that port and unloaded at the Aransas Shrimp Cooperative. There would be no advantage in marketing the catch elsewhere in Aransas Pass, since the price is uniform for all purchasers. If the fishing was conducted some distance from Aransas Pass, the captains would decide at which port the catch would be unloaded and to whom the catch would be sold. In each instance the unloading was done with the view to obtaining the highest possible price for the shrimp.

10. The captains paid the labor cost for net repairs. It was their function to keep the boat cleaned, oiled and greased while in port as well as while on trips. While in port, the latter responsibilities had to be discharged by the captains either with deckhands with whom they had an existing arrangement, or with other help provided by them. Neither the captains nor their helpers were paid for their work performed in port except as such payment came out of sharing in shrimp caught from the boat.

11. Under the arrangement between each plaintiff and their respective captains, the latter used, worked or fished the particular boat on the "lay" or share basis consistent with a long-standing custom in the fishing industry. During the period involved the sale proceeds for each catch were divided 40% to the captain and crew and 60% to the plaintiff. However, with respect to the

plaintiff Jack Yardley, the proceeds were split 50% to each with respect to small boats fishing in the bays. According to custom, it was understood that when the catch was put aboard the boat, the captain was then in possession of the catch which was owned by him (including the crew) and the plaintiff in the agreed proportions.

12. Plaintiffs did not share in fish caught or objects dredged from the water incidental to shrimp fishing. All such fish (such, for example, as snapper or flounder) and objects went to the captains and crews.

13. Heading was a necessary step in processing the shrimp for packing and ultimate sale and could be done either by the captain before unloading the catch, or by others after unloading the catch; but, if done before unloading, it served two purposes beneficial to both parties, to wit:

(1) It would reduce the weight of the shrimp and thereby permit a larger catch to be brought in, and

(2) It would help prevent the shrimp from spoiling, thus permitting a longer trip and insuring a fresher product.

The captains were assisted in the heading by their deckhands, but it was optional with the captains as to whether or not the shrimp would be headed before sale. If the heading was done by others than the crew, the cost was charged against the gross sale price before the division was made between the plaintiffs and the fishermen.

14. Plaintiffs had no direct relationship with the deckhands or crew. The captains selected them, worked them and agreed separately with them as to their pay, the latter being on a sharing basis which they negotiated between them. Plaintiffs usually did not know who the deckhands would be at the time the arrangement was

made with the captains to fish a boat and, in fact, the deckhands frequently changed from trip to trip. The plaintiffs learned the names of the deckhands for each particular trip at the time of settlement, in order to compute for the captains and deckhands their respective participation in the captains' share.

15. Various expenses were incurred in connection with each fishing trip. The crew paid for their own groceries and wearing apparel, which was in keeping with a long-standing custom in the fishing industry. All other trips expenses were paid by the plaintiffs. A processing cost for unloading and packing the shrimp was charged against the gross sale price before the division between the plaintiffs and the fishermen. All repairs and maintenance costs to maintain the vessel and equipment were the plaintiffs' obligation.

16. After each trip a settlement was made wherein the plaintiffs would provide the captains with a settlement sheet which indicated the gross amount of the proceeds from the sale of the shrimp whether sold to plaintiffs, or another. Any amounts charged by the crew for groceries, net repairs, and personal items were shown as a deduction from the crew's share. Any advances made to the captain or to crewmen with the captain's permission were also deducted at settlement. The settlement sheet further disclosed the division of the captain's share between him and the crew (that is, between the captain and his deckhands) in such amounts as they had agreed upon.

17. The captains decided how much fuel, ice and groceries to take aboard. The captains had the right to purchase their groceries at any store of their own selection including one of several where the plaintiffs had established credit. The captains decided what groceries to buy and purchased the groceries. They sometimes

paid cash but usually would charge them to the captains or crews in the name of the boat and the bill therefor would be sent to the plaintiffs. At the time of settlement the amount charged against the boat and paid for by the plaintiffs for the groceries was deducted from the captain's share of the proceeds from the sale of the shrimp.

18. Each trip was considered a separate transaction for purposes of settlement. The payment to the crew for each trip depended entirely upon the proceeds of the catch. The length of any given trip depended on various factors, such as the capacity of the boat, the fuel and ice supply, the weather, and the general shrimping conditions.

19. There was no guarantee of any kind of compensation to the captain, regardless of the time or effort expended, for attempting to catch shrimp. He was paid only for marketable shrimp caught. If shrimp spoiled before unloading the loss was borne by the plaintiffs and the fishermen jointly. If a particular trip was unsuccessful, known in the shrimping trade as a broker, and the value of a captain's share of the catch was insufficient to cover the captain's portion of the expenses of the trip, the captain's portion of the expenses would be carried over to succeeding trips to be deducted from the captain's share of the subsequent catches. The unpaid expenses were considered a personal obligation of the captain.

20. On occasion the plaintiffs would make an advance of money to captains out of their general funds with the understanding that it was a loan to be repaid. These loans were usually repaid out of the captains' share from future catches. Advances to deckhands by the plaintiffs were made with the permission of the boat captain who was personally charged with its repayment. The captain in turn would charge the amount against

the deckhand's share, which share had been agreed upon separately between the captain and his deckhands.

21. There was no express agreement specifying the extent to which plaintiffs had control over the fishing activities of the captains. It is clear that in fact, no actual control was exercised over the details, manner or methods employed by the captains and the crews.

22. The plaintiffs had no control over the crewmen, and did not attempt to exercise any control over their activities through the captains, nor did plaintiffs intend to reserve such exercise of control over them.

23. The plaintiffs' boats were not equipped with ship-to-shore telephones. They were equipped with radios which permitted contact with the boats only through a marine operator in the vicinity. Such contact between the plaintiffs and the boats was not frequent. The radio was used only for contact in case of emergencies, to ascertain weather conditions and the location of shrimp.

24. Each time and at the time a boat returned to port, the trip was over and the work of fishing on that trip was concluded. The catches, which were owned jointly by the captains (including their crew) and plaintiffs in the agreed proportions, were sold and the proceeds were divided.

25. Since shrimp is very perishable, it was in the interest of each party to make an immediate disposition of the catch upon reaching port.

26. While plaintiffs did not pay any captain a salary and did not guarantee any captain a profit from his fishing, plaintiffs did guarantee each captain a market for his part of the catch (if there was a catch) at the prevailing market price when brought to Aransas Pass, Texas. Each captain was thus assured that his part of the shrimp caught and brought to port would not be lost by spoilage.

27. On those occasions when captains decided to return and unload their catches at ports other than Aransas Pass, Texas, the captains would seek out a fish house where the best price was obtained and where the boats could be serviced with ice, fuel and provisions. It was the captains' prerogative to pay for these services and commodities out of the proceeds from the sale of the catch, or to charge them to the plaintiffs' credit. The captains may or may not have first called the plaintiffs and advised where the sales were being made. In the captains' discretion, settlements between the plaintiffs and captains were made at the fish house in the particular port whereby the captains and crews received their agreed share and the balance was forwarded to the plaintiffs. In this way fishing could continue at the existing fishing grounds without first returning to the home port at Aransas Pass, Texas. On other occasions the captains would cause the entire amount from the sale of the catch to be sent to the plaintiffs by the fish house who purchased the shrimp, and settlement would be deferred until the captain chose to make it.

28. The livelihood of a captain depended solely upon his initiative and skill as a fisherman coupled with the probables of weather and the run of the shrimp. He may have exerted his efforts for long or short periods of time and have no claim to earnings or compensation of any kind, while, on the other hand, he may have been well rewarded by a share of a large catch made in a short space of time.

29. The plaintiffs would usually have no written record of the identity of the crewmen on the vessels until the time of settlement. At the time of settlement, plaintiffs required the names of such crew members for the purpose of listing them on the appropriate records for State Unemployment Insurance and Federal Withhold-

ing and Social Security Tax purposes as required by the particular state and the Internal Revenue Service.

30. The arrangements between the plaintiffs and the captains contemplated a right reserved by the plaintiffs to control only the results of the fishing ventures and they interfered in the process to some degree to assure a proper result. The plaintiffs' primary interest was to obtain the largest catches of marketable fish possible. The manner, methods and details of conducting the fishing operation being the sole prerogatives of the captains, were conducted without interference by the plaintiffs.

31. There was no labor union contract in existence between the plaintiffs and the fishermen. The captains and crewmen were not members of a union. Each captain individually negotiated his contractural arrangements with the particular plaintiff-boat-owner and the crewmen, in turn, negotiated their arrangements for work and compensation solely with the captains.

32. Neither the captain nor crewmen are required to sign articles defining the parties' duties and obligations. Nor is there a requirement that a ship's log be kept by the captains of the shrimp boats.

33. The plaintiffs' boats did not operate under prearranged time schedules of departure and arrival nor were plaintiffs' boats required to follow prescribed courses and routes usually present in other maritime enterprises.

34. The plaintiffs filed proper employment tax returns with the Internal Revenue Service during the period here in issue and paid employment taxes on the earnings of the captains and crewmen.

35. Plaintiffs filed claims for refund of their portion of the Federal Insurance Contributions Taxes and Federal Unemployment Taxes paid on the earnings of the captains and crewmen. The claims were disallowed by

the Commissioner of Internal Revenue and this action, which followed, was timely filed.

36. There is no substantial evidence of any effort on the part of the plaintiffs to control the captains and crew members to such an extent that their status would be one of employee rather than one of independent demise charterer.

37. Finally, the degree of control exercised by the plaintiffs in the marketing of the product which was jointly owned with the fishermen was not such as to remove the relationship from that of independent demise charterer to that of employee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3377

CARLEEN F, INCORPORATED; MADELINE F, INCOPORATED; BRYAN PAUL, INCORPORATED; P. C. COMEAUX and W. M. GORE, m/v "Eva C"; DONNA JEAN, INCORPORATED; HAZEL FOSTER, INCOPORATED; ISABEL G, INCORPORATED; LESLIE LORRAINE, INCOPORATED; HAROLD N. ROTEREAU, t/a Trawler "St. Vincent"; THREE G'S, INCOPORATED; BLACK MAGIC, INCORPORATED; MISS DENE, INCORPORATED; SANDRA F, INCORPORATED,

Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(February 27, 1973)

Before BROWN, Chief Judge, GODBOLD and SIMPSON, Circuit Judges

PER CURIAM: This case is substantially the same as, and controlled by, *Bishop* v. *United States* (No. 71-3550) 5 Cir., 1973, —— F.2d ——.

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-3377

D. C. Docket No. 69-G-6

"CARLEEN F", INCORPORATED, ET AL.,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, Chief Judge, GODBOLD and SIMPSON, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that plaintiffs-appellees pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

February 27, 1973

Issued as Mandate: Mar. 21, 1973

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By /s/ Maryette Farley
Deputy
New Orleans, Louisiana

Jul. 2, 1973

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

[Filed June 25, 1971, Clerk, U. S. District Court, Southern District of Texas, V. Bailey Thomas, Clerk, By Deputy: /s/ Edith Rogers]

Civil Action No. 69-G-6

CARLEEN F, INC., *et al.*

v.

UNITED STATES OF AMERICA

Civil Action No. 69-G-46

ELIZABETH ANN, SUE, *et al.*

v.

UNITED STATES OF AMERICA

Joseph J. Lyman, Washington, D. C.; and Eli Mayfield, Palacios, Texas; for plaintiffs.

Anthony J. P. Farris, United States Attorney, Houston, Texas; Johnnie M. Walters and Ben A. Douglas, Assistant United States Attorneys, Fort Worth, Texas; for defendant.

MEMORANDUM AND ORDER

These cases were tried by the Court on June 1, 1970, but were not consolidated for trial. As the evidence presented in each case was virtually identical, and the questions of law and fact were the same, they shall be consolidated for disposition.

Background

In these tax refund actions plaintiffs contend that the fishermen who comprised the captains and crews of their shrimp boats were not their employees for the purposes of § 3100 et seq. of the Federal Insurance Contributions Act (hereafter FICA) 26 U.S.C. § 3100, et seq. From this it is reasoned that they were not obligated to deduct, withhold and contribute as taxes, portions of the moneys they and the fishermen received as settlements after the completion of various fishing expeditions undertaken by the fishermen in the plaintiff's boats.

This Court is familiar with these issues, having tried a very similar case in 1962 wherein the Court ruled in favor of the taxpayers. *Crawford Packing Co.* v. *U.S.A.*, 228 F.Supp. 549 (S.D. Tex. 1962); affd. 330 F.2d 194 (5th Cir. 1964). There this Court applied "land-based" common law when it determined that an employee-employer relationship did not exist between various fishermen and boat owners for the purposes of the FICA.

Since this decision, the Supreme Court has changed the test for determining when a person becomes an employee of a maritime connected enterprise for the purposes of FICA and the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq. (hereafter FUTA). *U.S.A.* v. *W. M. Webb*, 397 U.S. 179 (1970). There the high court reversed and remanded a decision of the Court of Appeals for the Fifth Judicial Circuit. It based this reversal on its conclusion that the lower court had misinterpreted the relevant criteria to be applied by it when it used the common law test which the Congress had provided in § 3121(d) of the FICA and § 3306(i) of the FUCA to determine whether an employee-employer relationship existed. There the Appellate Court had held the applicable common law standard governing the maritime related case before it to be one in which nonmaritime criteria were to be used to gauge the relation-

ship between fishing boat owners and the fishermen who manned the boats. *W. M. Webb* v. *U.S.A.*, 402 F.2d 956, 959 (5th Cir. 1968). In reversing, the high court held that the relevant criteria to be considered in a maritime case is the common law of seafaring men. *U.S.A.* v. *W. M. Webb*, 397 U.S. 179, at 191-194 (1970).

Thereafter, on April 27, 1970, the Court of Appeals issued a per curiam opinion reversing its earlier decision. *W. M. Webb* v. *U.S.A.*, 424 F.2d 1070 (5th Cir. 1970) (per curiam); cert. denied 400 U.S. 902 (1970). In its reconsideration of the cause the Court adopted the dictum in its earlier decision, *W. M. Webb* v. *U.S.A.*, 402 F.2d 956, 959 (5th Cir. 1968), wherein it had stated that if maritime criteria were to be applied by it, the Court would have found the fishermen to be employees for the purposes of the withholding tax statutes. *Id.*

In its 1968 decision the Appellate Court failed to articulate clearly the basis for this conclusion. *Id.* at 959. It is urged by the government that the Appellate Court's adoption of its earlier language drastically limits the criteria which this Court can consider when determining if the fishermen in this case are the maritime common law employees of the plaintiffs. The government reads the Appellate Court's post-remand decision for the proposition that, absent a demise charter, the boat owners are always the employers of the fishermen who use their boats for the purpose of imposing the obligation of FICA and FUCA taxes. The government, furthermore, contends that the Appellate Court dictated that the existence of a demise charter was to be determined by applying the restrictive standards used in recent maritime personal injury cases, wherein courts have striven to avoid finding a charter in order to place liability upon the presumptively solvent boat owners.

The plaintiffs do not so read the case. They contend that the alleged employers' degree of control over the

fishermen is still the governing criteria to be used in this Judicial Circuit for determining whether a FICA or FUCA employer-employee relationship exists.

Findings of Fact

1. This is an action under the Internal Revenue laws of the United States for recovery of taxes paid pursuant to the FICA § 3100 et. seq. of Title 26 of the U.S.C. for the periods set out in paragraph 2, infra, listing the several plaintiffs in each cause.

2. *A. Plaintiffs in Civil Cause No. 69-G-6:*

Each of the following were corporations organized under the laws of the State of Texas, and claimed refunds of the taxes in suit for the periods stated:

"Carleen F", Inc.	—January 1, 1965 through December 31, 1966
"Madeline F", Inc.	—April 1, 1964 through December 31, 1966
"Bryan Paul", Inc.	—January 1, 1964 through September 30, 1967
"Donna Jean", Inc.	—January 1, 1964 through September 30, 1967
"Hazel Foster", Inc.	—January 1, 1964 through December 31, 1965
"Isabel G", Inc.	—January 1, 1964 through December 31, 1964
	—January 1, 1966 through September 30, 1967
"Leslie Lorraine", Inc.	—January 1, 1964 through December 31, 1966
"Three G's", Inc.	—January 1, 1964 through September 30, 1967
"Black Magic", Inc.	—January 1, 1964 through September 30, 1967
"Miss Dene", Inc.	—April 1, 1964 through September 30, 1967
"Sandra F", Inc.	—January 1, 1964 through December 31, 1967

The plaintiffs P. C. Comeaux and W. W. Gore were individuals trading as the motor vessel, "Eva C", Inc., claiming similar refunds for the period January 1, 1964 through September 30, 1964; the plaintiff Harold N. Rotereau was an individual trading as the trawler "St.

Vincent" and claimed refunds for the period January 1, 1964 through December 31, 1966.

Each of the plaintiffs did business in the State of Texas within the jurisdiction of this Court during these periods of time.

B. Plaintiffs in Civil Cause No. 69-G-46:

The plaintiffs, "Elizabeth Ann," Inc. and the "Laguna IV", Inc. were corporations organized under the laws of the State of Texas.

The plaintiff Peter Karpenko was an individual trading as the Trawler "Joyce Elaine".

Each of the plaintiffs claimed refunds of the taxes in issue for the period commencing January 1, 1966 through June 30, 1968, and did business in the State of Texas within the jurisdiction of this Court during these periods of time.

3. During these periods each of the plaintiffs were engaged in the business of commercially fishing for shrimp. The activities of the plaintiffs' business embraced (a) the ownership of a shrimp trawler, (b) the fishing for shrimp under arrangements with captains on the conditions and pursuant to policies outlined in these Findings of Fact, and (c) the sale of the shrimp in the open market.

4. The shrimp boats weighed in excess of ten net tons and cost from $25,000 to $70,000 each. These boats were specially equipped, owned and operated solely for shrimp fishing, although fish other than shrimp (such as snapper or flounder) were sometimes inadvertently caught during the shrimping operations.

5. After the plaintiffs had equipped a boat for fishing shrimp, they would select experienced shrimp fishermen from the community, and would let the boat to the

selected men for commercial fishing. It was understood that the fisherman for whom a boat was let would be its captain and he was so recognized by plaintiffs. Any individual so selected was a person whom plaintiffs trusted (a) to select a crew (that is, deckhands), (b) to operate the boat, (c) to conduct fishing operations, and (d) to supervise and get along with the deckhands.

6. The arrangement between each plaintiff and captain was entirely oral. The term of the arrangement was not specified or limited. It could be terminated by either party, voluntarily or involuntarily, at the conclusion of any particular trip. In practice, this occurred only at times when a boat was in port. While the arrangement could be so terminated, custom and practice was that successive trips over an extended period of time were undertaken for each of the boats. Some captains would conduct fishing trips for brief periods, then perform similar services for other boatowners and later return to conduct fishing trips on plaintiffs' boats. While not formalized by the parties and designated as such, the arrangement constituted an oral contract pursuant to which the captains rented the boats belonging to plaintiffs on the terms and conditions and pursuant to the policies outlined in these Findings of Fact.

7. After an individual was selected as captain, he would take the boat identification papers to the Bureau of Customs and would register with the Bureau as captain of the boat. This registration was required by federal law.

8. Each captain determined the qualifications of and selected his deckhands (that is, his crew, consisting usually of two besides himself), determined the hours and working conditions of the crew, and determined the amount and method of their payment.

Each captain had full charge of his crew and determined (a) when to depart on a fishing trip, (b) when

to return, (c) where to fish (that is, which fishing ground to work), (d) when to fish, (e) how to fish (that is, the actual mechanical process of operating the fishing nets and gear), and (f) all other matters concerning the operation, maintenance and fishing of the boat from the time of departure from plaintiffs' dock until return of the boat from a particular trip. The foregoing were the exclusive prerogatives of the captain. The deckhands took their orders from the captain, exclusively.

The evidence showed beyond question that the plaintiff boat owners recognized the aforementioned prerogatives of the captains and promoted same because the traditions and customs of the shrimp fishing industry had shown them to be best suited to promoting the procurement of the largest catch. The captains and the boat owners did not believe that an employer-employee relationship existed between themselves. In fact, the evidence showed that the captains did not believe they would jeopardize their contractual relationships with the boat owners if they failed to follow instructions given to them by the owners.

9. The plaintiffs had certain general policies which were known to the captains and crews and which were part of the arrangement between each plaintiff and captain; for example, intoxicating liquors were not to be taken aboard the boats and the catches were to be returned to Freeport, Texas, if possible and if not, then to such port which in the captain's judgment would best serve the interests of the fishermen and the plaintiffs.

10. During this period, there was no union contract in existence between the plaintiffs and the captains and crewmen.

11. The plaintiffs gave no orders to the captains concerning the actual fishing operations, nor was there a requirement that the captains call the plaintiffs while underway fishing at sea. The plaintiffs' boats were not

equipped with ship-to-shore telephones. They were equipped with radios which permitted contact with the boats only through a marine operator in the vicinity. Contact between the plaintiffs and the boats was not frequent. The radio was used only for contact in case of emergencies or to ascertain weather conditions and the location of shrimp.

12. There was no requirement that the boat be docked before a certain hour nor that the boat refrain from putting to sea prior to a certain hour. These matters were left solely to the captains' discretion.

13. There was no requirement that a boat fish for a fixed period of time or that a certain size or weight of catch be obtained before returning to port. The duration of the trip and the volume of the catch were matters solely within the captains' discretion.

14. The captains, as opposed to the plaintiffs, decided if the weather was suitable and the boat seaworthy before putting to sea.

15. There was no fixed rest period of days between the date of the conclusion of a trip and the commencement of a new fishing trip. Whether there was a rest period, or the length of same, was determined by the captains. On some occasions, a boat could come into port to deliver marine supplies or other articles and the captain could decline to unload the shrimp catch until he considered that his fishing trip was completed.

16. There was no requirement while at sea that the captains fix the hours of work of the crew by watches, such as six hours on and six hours off between watches.

17. Plaintiffs had no right to and did not instruct the crews as to their work or how or in what manner to accomplish it.

18. Before or during each fishing trip, the plaintiffs would ascertain that the hulls of their vessels were prop-

erly insured. They would also inspect and/or acquire the fishing devices which each individual captain desired for the capture of shrimp. In order to facilitate the maximum productive use of their vessels the plaintiffs would inspect and repair any damage to the vessels' superstructure and repair and/or acquire navigation devices and radio equipment needed by the captain.

19. While the boats were kept at the plaintiffs' mooring facilities, the captains were not charged a mooring fee.

20. Before each voyage plaintiffs would acquire and pay for the amount of ice and fuel which the captains desired to take on the fishing expedition. The decision as to the amount of each to take was the *exclusive* decision of the captain.

21. During the years at issue the captains were responsible for repairing the nets and fishing gear which the plaintiffs provided them. They were also responsible for keeping the boats clean, oiled and greased while at sea or in port. The captains were also responsible for painting the vessels' superstructures. After 1967 the plaintiffs assumed the duty of painting the vessels. While this duty lay with the captain, he received no compensation for doing it beyond what he received for the sale of his portion of the catch made after a voyage. If he did not discharge his duties of repairing the nets, painting the vessel or otherwise maintaining it, the costs of doing this work would be deducted by the plaintiffs from the captains' portion of the moneys received for selling the catch.

22. Under the arrangement between plaintiff and each captain, the latter used, worked or fished his boat on the lay or share basis consistent with the long-standing custom in the fishing industry obtaining at least since the time of Christ. During the periods involved here, the catch of shrimp from each trip was divided 40

percent to the captain and crew and 60 percent to the plaintiffs. It belonged to the respective parties in this percentage when brought from the sea into the boat.

23. There were no guaranteed payments of any kind to be made to selected members of the crew out of the gross proceeds from the sale of the catch before the "lay" was divided.

24. Plaintiffs did not share in fish caught or objects dredged from the water incidental to shrimp fishing. All such fish (such, for example, as snapper or flounder) and objects went to the captains and crews.

25. Heading was a necessary step in processing the shrimp for packing and ultimate sale. This could be done either by the captain before unloading the catch, or by others after unloading the catch. If it were done before unloading, it served two purposes beneficial to both parties. First, it would reduce the weight of the shrimp, thereby facilitating a larger catch. Also, it would aid in spoilage deterrence, thereby enabling a longer voyage and a fresher product.

The captains were assisted in the heading by their deckhands, but it was optional with the captains as to whether or not the shrimp would be headed before sale. If the heading was done by others than the crew, the cost was charged against the crew's share and deducted therefrom as an expense to the captain and crew.

The cost of unloading and packing, called a processing cost, was deducted from the gross proceeds of the sale of the shrimp catch before the division was made between plaintiffs and the fishermen. Various other expenses were incurred in connection with each fishing trip. The crew paid for their own groceries and wearing apparel, which was in keeping with a long-standing custom in the fishing industry. All other trip expenses were paid by the plaintiffs.

26. Plaintiffs had no direct relationship with the deckhands or crew. The captain selected them, worked them and paid them, the latter being on a sharing basis which they negotiated between themselves. Plaintiffs did not know who the deckhands would be at the time the arrangement was made with the captains to fish a boat and, in fact, the deckhands frequently changed from trip to trip. The plaintiffs learned the names of the deckhands for each particular trip at the time of the settlement, in order to compute for the captains and deckhands their respective participation in the captains' share.

27. Plaintiffs at no time attempted to influence the captains to hire crewmen that plaintiffs desired to have aboard. There was no requirement that the captains hire crewmen who had previous experience for a fixed number of years as a condition for joining the crew. The captains were not required to give preference in hiring crewmen from any particular manpower source or hiring hall.

28. The captains, to the exclusion of the plaintiffs, decided the size of the crew to be shipped on the fishing trips.

29. After each trip a settlement was made wherein the plaintiffs would provide the captains with a settlement sheet which indicated the gross amount of the proceeds from the sale of the shrimp whether sold to plaintiffs or another. It disclosed a net division of 40 percent of the proceeds to the captain and crew and 60 percent to the plaintiffs. Any amounts charged by the crew for groceries and other personal items were shown as a deduction from the crew's share. If heading was done by a shore facility, the cost thereof was charged against the crew's share. The settlement sheet also showed that the processing cost was divided between the plaintiffs and the fishermen on a 60-40 basis in keeping with the

share arrangement. Finally, the settlement sheet disclosed the division of the captain's share between him and the crew, that is, between the captains and his deckhands in such amounts as they themselves had agreed upon.

30. Before the captain and crew embarked on a fishing trip, they procured and paid for their own groceries. The captains had the right to purchase their groceries at any store of their own selection for cash or on credit. The captains decided what groceries to buy and purchased them. Groceries were usually charged to the captains or crews in the name of the boat and the bill therefor would be sent to the plaintiffs. At the time of settlement the amount charged against the boat and paid for by the plaintiffs for the groceries was deducted from the captain's share of the proceeds from the sale of the shrimp.

31. Each trip was considered a separate transaction for purposes of settlement. The payment to the crew for each trip depended entirely upon the proceeds of the catch. The length of any given trip depended on various factors, such as the capacity of the boat, the fuel and ice supply, the weather, and the general shrimping conditions. In no instance did the plaintiffs attempt to regulate or limit the duration of a fishing trip. There were no certain days on which a captain was restricted from commencing a trip or unloading his catch, such as Sundays, Memorial Day, Fourth of July, Columbus Day, Christmas, and the like. These times and activities were left to the captain's discretion.

32. There was no guarantee of any kind of compensation to the captain, regardless of the time or effort expended, for attempting to catch shrimp. He was paid only for shrimp caught. If a particular trip was unsuccessful, and the value of a captain's portion of the catch was insufficient to cover the captain's portion of the expenses of the trip, the captain's portion of the expenses

would be carried over to succeeding trips. It would be deducted from the captain's share of the subsequent catches. The unpaid expenses were regarded as a personal obligation of the captain to be collected as any other debt.

33. On occasion, the plaintiffs would make an advance of money to captains out of their general funds with the understanding that it was a loan to be repaid. These loans were usually repaid out of the captains' share from future catches. Advances to deckhands by the plaintiffs were made with the permission of the boat captain who was personally charged with their repayment. The captain in turn would charge the amount against the deckhand's share, which share had been agreed upon separately between the captain and his deckhands.

The boat owners did not pay the captain and crew a bonus if a profit was made from the sale of a catch.

34. There was no express agreement specifying the extent to which plaintiffs had control over the fishing activities of the captains. *It is clear that in fact no actual control was exercised over the details, manner or methods employed by the captains and their crews.*

35. Plaintiffs expected that when a captain returned to Freeport, Texas, with his catch completed, he would unload the catch at the Western Seafood Company docks. This custom accommodated the convenience of each. Plaintiffs would be able to dispose of their portion of the respective catch at a higher profit to them. At the same time the captains would be guaranteed an immediate market for their percentage of the highly perishable cargo at the going market price in Freeport, Texas.

36. On some occasions the captains, in their discretion, would return the catches to ports other than Freeport, Texas. In these instances, the captains would unload the catch at a fishhouse of their choice and make

arrangements for the boats to be serviced with fuel, ice, groceries and other incidentals so the fishing could be continued without returning to the home port. In these instances, the captains usually called the plaintiffs after unloading. The cost of such services would be initially charged to the plaintiff but at the time of settlement, it would be allocated between the plaintiffs and the captains in the manner customarily used for settlements.

If a captain chose, he might cause a complete settlement of the catch to be made at a fish-house in a port other than Freeport, Texas. In these circumstances the captain would take his 40% of the net proceeds and cause the balance to be sent by the fish-house to the plaintiffs. This was done by a captain when in his judgment he believed the needs of fishing or weather required a prompt disposition of the catch.

37. The livelihood of a captain depended solely upon his initiative and skill as a fisherman and the vagaries of weather and the run of the shrimp. It was possible for a captain to exert himself for a long period of time and catch no shrimp, thus receiving no compensation for his efforts. While, on the other hand, for the same or lesser efforts he might have made a bountiful catch of shrimp and have received a large cash settlement because of a favorable market price.

38. The plaintiffs would usually have no written record of the identity of the crewmen on the vessels until the time of settlement. At the time of settlement, plaintiffs required the names of such crew members for the purpose of listing them on the corporations' records for State Unemployment Insurance and Federal Withholding and Social Security Tax purposes as required by the State of Texas and the Internal Revenue Service.

39. The plaintiffs did not require the captains to keep a ship's log, a bell log, or an engine log. They did, how-

ever, keep a radio log in order to comply with the regulations of the Federal Communications Commission.

40. Under the arrangements between the plaintiffs and the captains, the plaintiffs did not undertake to assign administrative or work duties to the boat's personnel. The captains and crew were not required to sign ship's articles defining their duties and obligations, as are the captains and crews aboard commercial, cargo and passenger vessels.

41. Under the arrangements here, the captains were not obligated to adhere to fixed schedules as to times of departure and arrival nor follow prearranged routes, both of which comprise the usual and ordinary procedures aboard cargo and passenger vessels.

42. Unlike the conditions aboard cargo and passenger vessels, there were no wages fixed by contract and paid irrespective of the success or failure of the enterprise.

43. In spite of the foregoing requirements for adherence to routine procedures aboard cargo and passenger vessels, the ships' captains may nevertheless exercise a broad discretion without consulting the owners when necessary to preserve the safety of the ship and its personnel or to avoid damage to the cargo or injury to passengers. Apart from this, the activities of cargo and passenger vessel captains are restricted by the metes and bounds established by the owner, and subject to the veto of the owner. By contrast, the plaintiffs, with respect to their shrimp boats, have clearly relinquished their possession, control and navigation to the captains. The owners retain only a limited right to control the results of the venture.

44. There is no substantial evidence showing that plaintiffs tried to or did control the manner in which the fishermen accomplished their tasks of catching shrimp. Nor is there substantial evidence showing that plaintiffs

exercised more than a limited control over the manner in which the shrimp were disposed of after their procurement. The evidence instead discloses that for the purposes of the FICA, the relationship between the plaintiffs and the fishermen was one of employer to an independent contractor who, in effect, rented or leased the owner's boat to engage in the catching of shrimp for the parties' mutual benefit.

45. Plaintiffs in both causes filed proper employment tax returns during the periods in issue and paid employment taxes on the earnings of the captains and crewmen.

46. Plaintiffs filed claims for refund of their portion of the FICA taxes paid on the earnings of the fishermen who manned their boats. These claims were disallowed by the Commissioner of Internal Revenue.

47. The plaintiffs' claims in Civil Cause No. 69-G-46 were timely filed.

48. The government contends that some portions of the claims filed in Civil Cause No. 69-G-6 were not timely filed. The government raised this assertion as an affirmative defense to the post trial amended complaint filed by plaintiff. Plaintiff joined issue with this defense. Neither side has briefed this aspect of the case.

Conclusions of Law

1. This Court has jurisdiction of the parties and the cause. 28 U.S.C. §§ 1340, 1346a(1) and 1402.

2. The FICA and the FUCA impose duties and taxes on employers to finance government benefits for employees.

3. The provisions of § 3121(d) of the FICA and § 3306(i) of FUCA provide that the usual common law rules are applicable in determining who are employees under these Acts.

4. Under the Acts, employer-employee relationships are to be discerned by applying the common law rules in the context of a particular industry. In determining whether the fishermen who performed fishing activities on plaintiffs' boats were employees under the Acts, it is necessary to apply the common law rules in the context of the relative maritime related industries—namely, fishing. The common law rules governing land-based activities cannot be used here. *See: U.S.A.* v. *W. M. Webb*, 397 U.S. 179 (1970); *U.S.A.* v. *W. M. Webb*, 424 F.2d 1070 (5th Cir. 1970); cert. denied 400 U.S. 902 (1970); *Mayport Fisheries Co.* v. *U.S.A.*, —— F.Supp. —— (Civil Action No. 68-1609) (E.D. La., April 7, 1971); *Anderson* v. *U.S.A.*, —— F.Supp. —— (Civil Action No. 780) (N.D. Fla., Sept. 30, 1970).

5. In *Webb* the Supreme Court pointed out that:

> *Control* is probably the most important factor under maritime law, just as it is under the test of land-based employment. It may be true that, in most maritime relationships, the workers enjoy discretion that is unusually broad if measured by land-based standards—a discretion dictated by the seafaring nature of the activity. However, except *where there is nearly total relinquishment of control* through a bare-boat, or demise, charter, the owner *may* nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer. (Emphasis added)

Id. at 192. Also see the cases cited above in Conclusion No. 4. *Cf.: William C. McCombs, Co.* v. *U.S.A.*, 436 F.2d 979 (Ct. Cl. 1971)

6. The Government's contention that the captains and crews had to be plaintiffs' employees because the plaintiffs had not entered a demise charter with them is incorrect. In a strikingly similar fishing withholding refund case, *Bishop* v. *U.S.A.*, —— F.Supp. ——, (Civil Action No. 68-C-82) (S.D. Tex., June 2, 1971), Judge

Owen D. Cox of this Court considered arguments and facts similar to those at issue here. This Court is fully in accord with Judge Cox's decision and adopts the pertinent portion appearing on pages 3-11. There Judge Cox found that the captains of the boat owners' shrimp boats had entered demise charters with the boat owners and therefore could not be their common law employees for the purposes of FICA and FUCA. He states:

> Under general maritime law, the existence of a demise negates an employer-employee relationship between the vessel owner and the crew and says rather that the owner *pro haec vice* is the employer of the crew. Whether or not a demise exists depends on the actual basis of the relationship, and there is convincing authority that fishing on the lay as above outlined creates a demise charter, thereby making the captain of the vessel the owner *pro haec vice* and the employer of the fisherment.
>
> In *Thorp* v. *Hammond*, 79 U.S. (12 Wall) 408 (1870), the general owners of a vessel were held not to be liable for damages resulting from a collision between that vessel and another where one of the co-owners had become the charterer of the vessel, exclusively commanding, sailing and managing it, under arrangements made with the other owners. The Supreme Court pointed out, on page 416, that:
>
> > 'He sailed the vessel on shares, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying to the general owners the other half. It is clear, therefore, that he must be considered as having been the owner *pro haec vice*.'
>
> In *The Carrier Dove*, 97 F.111 (1 Cir., 1899), the master chartered a fishing vessel on the "quarter clear lay" of the catch. In answer to a suit by the fishermen to establish a lien against the owners for wages, the First Circuit clearly indicates that a

"fishing on the lay" agreement created a demise between the owner and the captain with the upshot that the crew are employees of and must look to the captain and not the owner. See also *The Mettacomet*, 340 F. 308 (D. Mass., 1915), aff'd 233 F. 261 (1 Cir., 1916).

The First Circuit continued to adhere to the reasoning of *The Carrier Dove* in *Cromwell* v. *Slaney*, 65 F.2d 940 (1 Cir., 1933), wherein the plaintiff, wife of a deceased seaman, sought recovery from the owner, as employer of a fishing vessel, on grounds of negligence and unseaworthiness. In denying the existence of an employer-employee relationship between the deceased seaman and the owner, the First Circuit stated, at page 941:

> 'The operation of fishing vessels under agreements, or lays, so-called, for sharing the proceeds of the catch, has been familiar to those engaged in the business and to the courts for more than a century; and it has been held by the courts that, under a "fishing lay," where the captian employs the members of the crew and controls all the operations of the vessel, both in purchasing supplies for the voyage, in determining where he will fish, how long, and in disposing of the catch and settling all the bills, he becomes the owner *pro haec vice*, and that the crew is in the employ of the master and not of the owner.'

The Ninth Circuit has recognized the reasoning of the First as valid, but did not follow it in *The Norland*, 101 F.2d 967 (9 Cir., 1939), involving a Jones Act claim, because the facts did not support it. The Court held that one of the owners went on the voyage to supervise the captain, and, ". . . that the crew was controlled as to where the fishing was to be done, the labor to be performed, and even as to the manner of the performance of their labor . . ." In light

of these facts, the Court then spoke of the facts involved in *The Carrier Dove*, *Cromwell* and *Thorp*, supra, as showing "clearly that the general owners had surrendered entire control, direction and management of the vessel to the master. . . ." *The Norland* points out that the issue of the existence of a demise is one of fact, and, by implication, that the trier of fact can, under the authority of *The Carrier Dove*, *Cromwell* and *Thorp*, supra, find upon facts as in the instant case a demise, with the result that seamen are employees of the captain.

The courts have deviated from the general maritime law in personal injury and wrongful death cases by requiring, for humanitarian reasons, that fishermen, being wards of the sea, not be precluded *ipso facto* from recovery simply by the construction of an implied demise. The Court does not believe that cases which create an enlarged standard for humanitarian purposes should be considered as changing the general maritime law or the maritime common law. The common law is generally described as those principles, usage and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. The deviation as to personal injury and wrongful death cases has come about by virtue of the courts' attempt to construe the congressional intent in Jones Act cases. Now, the Court will consider the cases cited by Defendant, and explain why such cases are no authority for denying the existence of a demise on the facts of this case.

In *Hudgins* v. *Gregory*, 219 F.2d 255 (4 Cir., 1955), fishing on shares was held merely not *ipso facto* to create a demise between the master of the vessel and the owner for the purpose of determining an employer-employee relationship upon which to predicate an action under the Jones Act for personal injuries by a seaman. The payment of Social Secur-

ity and unemployment compensation taxes was used as a part of the basis for determining the plaintiff to be an employee of the owners, not the other way around. Such method of reasoning cannot justify a claim of authority.

The Defendant also cited *Peters* v. *Rohrman*, 272 F. 338 (D. N.J. 1921), which case stated, at page 339:

> 'A master operating a vessel on shares is not *ipso facto* an owner *pro haec vice*, but, as is conceded by the counsel for the libelant, an express agreement must be shown, or circumstances from which such agreement can be inferred, by which the possession and control of the vessel was surrendered to the master.'

There the Court found a demise based upon circumstances similar to the instant case and that as a result of that demise, the owners could not be held liable for the charterers' breach of a contract of affreightment.

In *Justillian* v. *Versaggi*, 169 F.Supp. 71 (S.D. Texas 1954) (Allred, J.), the Court held that the captain of a shrimp boat was not the owner *pro haec vice* and therefore not the employer of a seaman who sought recovery from the owner of the vessel under the Jones Act. While we are aware that there is some similarity of the facts here to those in the instant case, the Judge who heard the testimony and observed the witnesses, concluded, on page 72, "Respondent prescribed rigid safety rules and required the Captain to report when any equipment was out of order. His own testimony, quoted in respondent's brief, shows a rather firm and rigid control of the vessel by respondent."

Here also, the Court used the deducting of withholding and Social Security taxes as one of the bases for determining the employer-employee relationship.

In the instant case, the Court must reach the conclusion that the owner is the employer first, before considering whether or not such taxes are owed.

Other seamen's personal injury cases cited by the Defendant are even less in point than *Justillian*, supra, and merit no analysis. Moreover, even though this Court would probably be bound to follow *Justillian* should a similar Jones Act case arise here in the Southern District of Texas, it should be noted that on similar facts, even involving seamen's personal injury, at least one other court has gone the other way and found a demise between the owner and the captain of a vessel fishing on shares. *Solet* v. *M/V Capt. H. V. Dufrene*, 303 F.Supp. 980 (E.D. La., 1969).

The defendant attempts to buttress its position by citing *Guzman* v. *Pichirilo*, 369 U.S. 698, 700 (1962), for the authority that courts should be reluctant to find a demise charter when the dealings between the parties are consistent with any lesser relationship. This is a reading of dictum in *Guzman* totally out of context from the instant case. There the issue was whether an injured longshoreman could recover from the owner of the vessel for unseaworthiness, which had arisen during that time the owner contended the vessel was demised to the longshoreman's employer. Clearly, the humanitarian policies concerning whether to favor a demise were far afield in *Guzman* from those in the instant case. Furthermore, close scrutiny of the cases upon which this dictum of *Guzman* was founded tends to strengthen the proposition that within a commercial context, as opposed to a personal injury context, a court may readily imply the existence of a demise under appropriate circumstances. For example, in *Reed* v. *United States*, 78 U.S. (11 Wall) 591 (1870), the general owner retained possession, command, and navigation of the ship, *hired the crew*, and contracted to carry cargo for a *specified voyage*. In the in-

stant case, there was no specified voyage and the owner clearly did not hire the crew. See also *Leary* v. *United States*, 81 U.S. (14 Wall) 607 (1871), in which the owner supplied the crew and retained possession of the vessel. Also cited by Guzman was *United States* v. *Shea*, 152 U.S. 178 (1893), wherein a demise was found to exist because the vessel was under the exclusive management and control of the government charterer. Whatever presumption against finding a demise, as argued by Defendant, did not appear to be in operation in *Shea*, even though "... the question (of a demise) . . . (was) . . . not free from doubt . . ." 152 U.S. 191.

By dictum, the Fifth Circuit, in *Osland* v. *Star Fish & Oyster Co.*, 107 F.2d 113 (5 Cir. 1939), addressed itself to the issue of whether fishing on shares may be considered a demise from the owner to the captain. There, a seaman was allowed to seek recovery under the Jones Act against the owner of a vessel fishing on the lay plan. The Court stated on page 114:

> '(The owner) was operating the Mary Carmen in connection with its business of selling fish at wholesale; it furnished the boat and supplied the crew and vessel with oil, gasoline, groceries, bait, and other necessaries for the voyage; it ordered her to sail for a designated place on the Gulf for the purpose of catching a load of fish; it ordered the master to bring said fish to the port of Mobile and to unload the same at its plant.'

From a reading of this quote, it is apparent the owner exercised a great deal more control than any of the Plaintiffs now before this Court.

The Defendant has filed to indicate any authority that would preclude this Court from finding a demise here, although the government places considerable reliance on the *Webb* case, with its several opinions.

The Fifth Circuit, by way of confirming dicta previously written, did, after the Supreme Court said the standards of maritime law must be observed, hold, without citation of authority, that, under the peculiar facts of the case, the seamen were employees of the boat owner. Even so, *Webb* does not bar the finding of a demise here, since that case did not expressly consider the authority this Court has cited for the proposition that a demise may exist on the facts this Court must consider. We recognize there may be some justification for the Fifth Circuit in *Webb* holding as it did, but, the facts there are dissimilar from these. For example, in *Webb* (271 F. Supp. at 271, 253 and 254), the established facts showed that the boatowners designated the general area for fishing operations, the number of crewmen to be hired, the minimum scale of wages to be paid the crewmen by the captain, the size of bonuses paid the crewmen at the end of a season, where the fish were to be sold, and also provided airplane spotters to aid the captains in locating schools of fish. On the other hand, the facts this Court must deal with show that the captains determined wages, bonuses, crew size, fishing locations, where to sell their catch, and fished without the aid of boatowner-financed airplane spotters. Finally, a close reading of the various *Webb* opinions leaves considerable doubt with this Court that *Webb* was truly a lay or share arrangement under ancient maritime authority because of the extremely significant fact that the boat owners guaranteed for the entire season a fixed price per thousand pounds. Thus, in *Webb* the captains did not share the risks involved in fluctuating market prices as is done under the traditional share or lay agreement.

The Fifth Circuit, in 402 F.2d at 960, moreover, impliedly approved of *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961, 962, 963, 967 (Ct. Cl. 1964), which was the only tax case, as opposed to a per-

sonal injury case, that has directly considered the possibility of a demise under anything near the instant case. Although *Cape Shore Fish Co.* reached a contrary result than here, it also is readily distinguishable on the facts.

For example, in *Cape Shore Fish Co.*, the fishing venture was governed by a union contract. 330 F.2d at 962. Here, there was no union or other contractual agreement between the vessel owners and the crews. In *Cape Shore Fish Co.* the captain was hired with the understanding of continuity of employment from trip to trip. Here, there was no term contemplated beyond each trip. In *Cape Shore Fish Co.* the owner was understood to have authority to instruct the crew and did so. Here, beyond standing customs, there were no instructions given the crews by the vessel owners.

In *Cape Shore Fish Co.*, the owner told the captain when to sail, when to return to port, when to paint the boat, when to report the size of the catch by telephone, when to dock the boat, how long to stay at sea, how long to work the crew at sea, how many days to rest the crew ashore, and how to distribute the catch among the crew. Here, these matters were solely within the prerogative of each captain. Also, in *Cape Shore Fish Co.*, the crew was guaranteed a minimum wage for each day at sea, by virtue of a union contract, should the trip be a failure or "broker." Here, there was no guarantee, either to the captains or their crews.

Finally, *Cape Shore Fish Co.* itself recognized that fishing on the lay could, under appropriate circumstances, create a demise (330 F.2d 967) and that whether, for tax purposes, fishermen are employees of the owner or are employees of the captain of the vessel depends, in turn, on the facts before the Court.

In conclusion, save for *Cape Shore Fish Co.*, supra, the cases cited by the Defendant for the proposi-

tion that a demise should not be implied on the facts of this case are not persuasive because they belong to that group of cases in which the Courts, in order to follow a humanitarian policy set by Congress to provide injured seamen with the possibility of recovery from the vessel owner, rather than the sometimes less solvent charterer, deviated from the general maritime law. But other authority and the factual distinctions between this case and the *Cape Shore Fish Co.* persuade the Court to find that *on these facts* there exists between the various vessel owners and the captains a demise agreement by which the crew are employees of the respective captain-owners *pro haec vice*, rather than of the vessel owners.

Inherent in *Webb*, supra, and in the Defendant's brief here is the implication that the vessel owners, rather than the captains, would be more responsible sources upon whom the liability of collecting these taxes for the benefit of these seamen should fall. Even assuming, arguendo, that to be so, this Court cannot deny the Plaintiffs here the ancient maritime precedent cited for the proposition that these lay agreements created demise charters. To hold these seamen to be employees of the owners *on these facts* in order to provide them supposedly a more responsible collection source will require a change in established maritime doctrine—a change this Court leaves to the Congress.

7. The same reasoning applied by Judge Cox in *Bishop* is of equal applicability here. Applying it to the facts at issue, it becomes clear that the plaintiffs and their captains had entered implied demise charter arrangements. As admitted by the government, once this relationship is found to exist, the plaintiffs cannot be the employers of the fishermen and be required to meet the obligations of the FICA.

8. Regardless of the fact that plaintiffs had chartered their boats to the captains, this Court is of the opinion that the plaintiffs in the instant case were not the employers of the fishermen. This conclusion is predicated upon the Court's finding that the plaintiffs did not control the manner in which the shrimp were caught, nor exercise complete control over the disposition of the resulting catch in ports other than Freeport, Texas. *Mayport Fisheries Co.* v. *U.S.A.*, supra; *Anderson* v. *U.S.A.*, supra; *cf.: Bishop* v. *U.S.A.*, supra.

9. As there is no contention that the refund claims in Civil Action No. 69-G-46 are in any manner time-barred or excessive, same are granted.

Likewise, the refund claims in Civil Action No. 69-G-6 which are not contested for being time-barred or excessive are granted.

In light of the foregoing, it is ORDERED that:

1. Within twenty (20) days the parties shall consult and submit to the Clerk a proposed form of final judgment in Civil Action No. 69-G-46, and a proposed form of partial final judgment in Civil Action No. 69-G-6. Both shall conform to the Court's reasoning herein and recite the amount of taxes to be refunded to the individual claimants at bar whose claims are not contested as being time-barred or excessive.

2. Coincidentally, with the submission of the judgments, each counsel shall submit a brief to the Court on the limitations and excess defenses raised by the Government in Cause No. 69-G-6. Reply briefs, if desired, shall be submitted within ten (10) days after receipt of the original briefs by counsel.

3. The Clerk shall send copies of this instrument to counsel of record.

DONE at Houston, Texas, this 23rd day of June, 1971.

/s/ [Illegible]
Judge

TRUE COPY I CERTIFY
ATTEST:

V. BAILEY THOMAS,
Clerk

By /s/ Edith Rogers,
Deputy Clerk

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 3121. DEFINITIONS.

(a) * * *

* * * *

(d) *Employee.*—For purposes of this chapter, the term "employee" means—

(1) an officer of a corporation; or

(2) an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

* * * *

[26 U.S.C. (1952 ed., Supp. II) 3121.]

SEC. 3306 [as amended by Sec. 1, Act of September 1, 1954, c. 1212, 68 Stat. 1130]. DEFINITIONS.

(a) * * *

i *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * *

(26 U.S.C. 1964 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 code):

§ 31.3121(a)-1

* * * *

§ 31.3121(d)-1 WHO ARE EMPLOYEES.

* * * * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom services are performed the legal relationship of employer and employee.

(2) Generally such relationship exists when the persons for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he had the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * *

(26 C.F.R. 31.3121(d)-1.)

§ 31.3306(i)-1 WHO ARE EMPLOYEES.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31-.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an

employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

[26 C.F.R. 31.3306(i)-1.]

Merchant Marine Act of 1920, ch. 250, 41 Stat. 988, Sec. 33; 46 U.S.C.A. § 688 [Jones Act]

"§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, main-